

AGE DISCRIMINATION AGAINST PUBLIC SAFETY OFFICERS

Y 4. L 11/4: S. HRG. 103-680

Age Discrimination Against Public S... **ING**

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON

LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 2722

TO ALLOW STATE AND LOCAL GOVERNMENTS TO IMPOSE MANDATORY
RETIREMENT AND MAXIMUM HIRING AGES ON THEIR PUBLIC SAFETY
OFFICERS

APRIL 19, 1994

Printed for the use of the Committee on Labor and Human Resources



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AGE DISCRIMINATION AGAINST PUBLIC SAFETY OFFICERS

TUESDAY, APRIL 19, 1994

U.S. SENATE,
SUBCOMMITTEE ON LABOR, OF THE COMMITTEE ON LABOR
AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room SD-628, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum, Wellstone, and Thurmond.

Also Present: Representative Owens.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Good morning. This hearing will come to order.

Last fall, the House of Representatives passed H.R. 2722, a piece of legislation that I consider ill-advised, and that is the best I can say about it. I also consider it a breach of faith, a failure to live up to a commitment, and a failure to have a sense of integrity, because the police and the firemen made a deal 7 years ago when this legislation was before the Congress and asked for a 7-year extension. And now, for them to come back here and ask for a permanent extension of the exemption, in my opinion, indicates a lack of integrity on their part, and I resent it.

I resent it not for myself, but for the people who are 55 years of age and older and who are going to be forced out of their jobs. What a cruel and inhumane position for any organization to take.

This bill would amend the Age Discrimination in Employment Act to allow State and local governments to impose mandatory retirement and maximum hiring ages on all public safety officers. Why? Why don't we do that to everybody in the country, then—throw everybody out who is 55 years and older. Why do we care? Why should we just pick on police and firemen? There are other jobs that are tough to do, whether you are in the construction trades or any other areas. But no. They do not have the same lobby.

After the House passed H.R. 2722 in November, it was referred to the Senate Labor and Human Resources Committee. I have called today's hearing to address the many issues surrounding this bill. I have asked Representative Major Owens to join me today, and I hope that he will do so because he sponsored this legislation in the House of Representatives.

This legislation is as wrong as it could be. It is cruel. It is blatant age discrimination. I would say to any who would vote for it that they should have to personally tell the 56-year-old officer, who has stayed in shape his entire life, that he should be put out to pasture, or to the 56-year-old fireman: "You have had it, man. Get on your way."

I am 76 years old, and nobody has told me that I have no right to serve in the Senate. Representative Major Owens, the sponsor of the House legislation, is 57 years old, and no one is telling him that he has no right to be here. If we do it for police and firemen, maybe we ought to do it especially for Senators and Representatives. Maybe we ought to tell them they cannot serve after they are 55 years of age.

What is equally deplorable is that the Federal Government also has mandatory retirement for Federal public safety officers and Capitol Police. I have introduced a bill, S. 1984, that will remedy that.

As I said before, in 1986, we prohibited mandatory retirement because it recognized that age should not prevent a qualified individual from working. By establishing a national retirement policy based on ability and performance rather than the arbitrary factor of age, the 1986 legislation recognized and protected the dignity of older Americans.

To ease the transition for State and local governments, Congress permitted them to keep their mandatory retirement rules and maximum hiring ages for public safety officers for a temporary 7-year phaseout period. That was part of a negotiated deal with me.

Congress also required the Equal Employment Opportunity Commission to conduct a study to determine whether a case could be made for a permanent exemption. The study, conducted by Dr. Frank Landy, found that "age is a poor predictor" of physical and mental fitness for public safety positions and that job-related tests exist which are much better predictors. Another study by the FBI Academy essentially confirms the same result.

So now we know we can test to determine a public safety officer's ability to work. What we will find as these tests are administered is that some 35- and 45-year-old officers will fail the tests, and some 60-year-old officers will pass.

These tests are feasible to administer, cost-effective, and a better alternative than mandatory retirement on the basis of age. Among public safety departments that responded to the EEOC's request for information, most reported that they had no maximum age for hiring, and about half had no written retirement policy. In addition, approximately one-third of the fire departments and one-quarter of the police departments required job-related tests from their continuing employees. What these numbers tell me is that if some departments can operate effectively without mandatory retirement rules and use instead job-related tests for retention, then all departments can.

What this will mean is that we will have a healthier and more fit public safety force, and I believe that we all will be the better for it.

Requiring safety officers, police and firemen to pass job-related tests will make each officer more fit and healthy. It will reduce de-

partment injuries and workers' compensation claims and result in fewer absences. Most importantly, the public will be better protected by a public safety force that is made up of qualified individuals, young and old alike.

I believe H.R. 2722 is bad public policy. I will do everything within my power to defeat it. I strongly oppose the addition of H.R. 2722 to the House crime bill, and if necessary I will filibuster against the crime bill if this provision is left in it by the conferees.

But because I think it is important that we hear all sides of this issue, I have called witnesses who will describe both its pros and cons. I look forward to today's hearing, but I doubt that my mind will be changed. This is a subject that I think relates very directly to what is right and what is wrong for people in this country. All of my life, I have fought against discrimination, and this is discrimination in its rawest and rankest form.

[The prepared statement of Senator Metzenbaum follows:]

PREPARED STATEMENT OF SENATOR METZENBAUM

Good morning. Last fall, the House of Representatives passed H.R. 2722, a piece of legislation that I consider ill-advised, at best. This bill would amend the Age Discrimination in Employment Act to allow State and local governments to impose mandatory retirement and maximum hiring ages on their public safety officers. After the House passed H.R. 2722 in November, it was referred to the Senate Labor and Human Resources Committee. I have called today's hearing to address the many issues surrounding this bill. I have asked Representative Major Owens to join me today and I am glad he was able to do so because he sponsored this legislation in the House of Representatives.

This legislation is wrong; it is cruel; and it is blatant age discrimination. I would say to any who would vote for it that they should have to personally tell the 56-year old officer who has stayed in shape his entire life that he should be put out to pasture. I am 76-years old, and nobody has told me that I have no right to serve in the Senate. Representative Major Owens, the sponsor of this legislation in the House, is 57, and no one is telling him that he has to be here. What is equally deplorable is that the Federal Government also has mandatory retirement for Federal public safety officers and Capitol Police. I have introduced a bill, S. 1984, that will remedy that.

H.R. 2722 has a history. In 1986, Congress prohibited mandatory retirement because it recognized that age should not prevent a qualified individual from working. By establishing a national retirement policy based on ability and performance, rather than the arbitrary factor of age, the 1986 legislation recognized and protected the dignity of older Americans.

To ease the transition for State and local governments, Congress permitted them to keep their mandatory retirement rules and maximum hiring ages for public safety officers for a temporary seven-year phase-out period. Congress also required the Equal Employment Opportunity Commission to conduct a study to determine whether a case could be made for a permanent exemption. The study, conducted by Dr. Frank Landy, found that "age is a poor predictor" of physical and mental fitness for public safety positions

and that job-related tests exist that are much better predictors. Another study by the FBI Academy essentially confirms this result.

So now we know we can test to determine a public safety officer's ability to work. What we will find as these tests are administered is that some 35- and 45-year old officers will fail these tests; and some 60-year old officers will pass.

These tests are feasible to administer, cost-effective and a better alternative than mandatory retirement on the basis of age. Among public safety departments that responded to the EEOC's request for information, most reported that they had no maximum age for hiring, and about half had no written retirement policy. In addition, approximately one-third of fire departments and one-quarter of police departments require job-related tests for their continuing employees. What these numbers tell me is that, if some departments can operate effectively without mandatory retirement rules and use instead job-related tests for retention, then all departments can.

What this will mean is that we will have a healthier and more fit public safety force and I believe that we all will be the better for it. Requiring public safety officers to pass job-related tests will make each officer more fit and healthy. It will reduce department injuries and workers' compensation claims, and result in fewer absences. Most importantly, the public will be better protected by a public safety force that is made up of qualified individuals, young and old alike.

I believe that H.R. 2722 is bad public policy. I strongly oppose the addition of H.R. 2722 to the House Crime Bill. But, because I think it is important that we hear all sides of this issue, I have called witnesses who will describe both its pros and cons. I look forward to hearing today's testimony from all of the witnesses.

Our first panel of witnesses today includes Leon Monroe, a retired Capitol Police officer, of Baltimore, MD; Captain Robert T. Devereaux, a Massachusetts State Police officer, of Boston, MA, accompanied by James B. Conroy, of Donnelly, Conroy and Delhaar, of Boston; Sam A. Cabral, international secretary-treasurer of the International Union of Police Associations, AFL-CIO, Washington, DC; and deputy chief James Weston, Reno Police Department, Reno, NV.

Would you be good enough to take your seats at the witness table?

Leon, it is good to see you. It is the first time in my life I have ever seen you not in a police uniform. Each one of us in the Senate pretty much saw you regularly as we left the Senate late at night, regularly; you were always there at the door. And I know from my conversations with you that you were one who did not want to retire, but you were told that you had to.

I might say that Senator Mikulski wanted to be here but could not be here by reason of another hearing this morning; but she asked me to extend her apologies to you for her inability to be with us this morning.

Please proceed.

STATEMENTS OF LEON A. MONROE, RETIRED CAPITOL POLICE OFFICER, BALTIMORE, MD; ROBERT T. DEVEREAUX, CAPTAIN, MASSACHUSETTS STATE POLICE, BOSTON, MA, ACCOMPANIED BY JAMES B. CONROY, DONNELLY, CONROY & GELHAAR, BOSTON, MA; SAM A. CABRAL, INTERNATIONAL SECRETARY-TREASURER, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, WASHINGTON, DC; AND JAMES WESTON, DEPUTY CHIEF, RENO POLICE DEPARTMENT, RENO, NV

Mr. MONROE. Good morning, Chairman Metzenbaum. I am delighted to see you again, and I thank you for the privilege of allowing me the opportunity to come before this hearing.

My name is Leon Monroe, and I was retired from the U.S. Capitol Police on January 31, 1994, at the age of 62. I was forced to retire under a Federal law that requires Capitol Police to retire after 55 or once they reach 20 years of service. And I would like to point out that at the time that I came on in 1974, there was no mandatory age retirement.

Congress passed this law for the Capitol Police in 1990, and the law became effective October the 1st of 1992. I saw a draft of this law in 1988, in 1989, and the early part of 1990, and at that time there was a grandfather clause in the law that exempted those who came on before the law became effective. But when the law was passed, all of this information was not in the law.

I understand now that approximately 110 officers have been forced to retire. And I thank you, Senator Metzenbaum, for introducing a bill that would abolish mandatory retirement for Capitol Police and other Federal law enforcement officers and fire fighters.

I want you to know that personally, Senator, from the deepest part of my heart, how much I appreciate what you are doing.

I believe that I was capable of working longer, and I wanted to work longer. I am in good health. I am not on any medication. I am able to move around freely without any physical problem whatsoever.

I received tributes from the Senate floor from several Senators. They said things like, "Officer Monroe has been recognized time and again for his diligence and professionalism. His file is full of letters from citizens and members of the House and the Senate, complimenting the superb manner in which he carries out his duties. He has also shown concern for his coworkers by donating his leave to those who have experienced extended absences because of illness or injury. He is one of the very best people I have known since I have been in Washington."

When I retired, the Sergeant-at-Arms of the U.S. Senate had a retirement ceremony for me, and I was moved that most of the—in fact, all of the Senate leadership—came and paid tribute to me. Senator Dole, the distinguished Minority Leader, gave me a plaque; and Senator Mitchell, the distinguished Majority Leader, gave me a plaque.

I believe I was able to do the kind of work that would call for these compliments because I loved my job. And I believe that I gave my best, because when I was growing up, my father always said, "Whatever you do, do your best." I gave my heart to my job, and I tried to do everything I could for the Senators, for their fami-

lies, for the staff, and for the public who came in, as well as for coworkers.

As one of the Senators mentioned in his tribute on the floor, I always tried to be friendly, courteous, polite and helpful to everyone. During 20 years of service, I only missed a total of 51 days sick leave, and 80 hours of that was taken in the last 3 months because personnel could not compute 80 hours because of the "take it or lose it" policy.

Being forced to retire has been a real hardship for me. Since this law passed in 1990, and I had to retire in January of 1994, I had very little time to prepare for my retirement because I had to retire so much earlier than I had intended.

I now have to make house payments, car payments, and pay other bills on a retirement pension that is half of the salary I was making before. Furthermore, I have not received at this time my full half retirement pay because it takes about 4 to 5 months to receive it. I have received an interim payment which is about half of the half of the retirement pay.

I used to try to help out my sister and my niece, who are in real financial need, whenever I could, but now I do not have the money to do that. I also give money to the church, but I am having trouble doing that now, too.

I am suffering emotionally as well as financially. I miss my job and my coworkers. I miss being in the Senate, and I miss the Senators and their families.

I am working part-time now, directing traffic for school children, at Mount Zion Baptist Church in Baltimore, MD, but it is not the same. There is no comparison.

I would very much like to go back to work in the Senate. I do not believe this law that forced me to retire is fair. I believe it is age discrimination. If I were not able to work, that would be a different story, but I am able, so I think it is wrong.

I would like to thank the chairman for letting me testify.

[The prepared statement of Mr. Monroe follows:]

PREPARED STATEMENT OF LEON A. MONROE

Good morning. My name is Leon Monroe and am a retired Capitol Police Officer. I was forced to retire on January 31, 1994, at the age of 62.

I was forced to retire under a federal law that requires Capitol Police to retire the later of age 55 or once they reach 20 years of service. Congress passed this law in 1990, and it became effective in October of 1992. Since the law became effective, understand that approximately 110 officers have been forced to retire. I understand that Senator Metzenbaum has introduced a bill that would abolish mandatory retirement for Capitol Police and other federal law enforcement and firefighters I want the Senator to know that I appreciate his efforts.

I believe I was capable of working longer and I wanted to work longer. In fact, when I retired, I received a tribute on the Senate floor from several senators. They said things like, "Officer Monroe has been recognized time and again for his diligence and professionalism. His file is full of letters from citizens and members of the House and Senate, complimenting the superb manner in which he carries out his duties. He has also shown concern for his co-workers by donating his leave to those who have experienced extended absences because of illness or injury. He is one of the very best people I have known since I have been in Washington." When I retired, the Sergeant-at-Arms of the U.S. Senate had a retirement ceremony for me and I was moved that most of the Senate leadership came to the party. Senator Mitchell even gave me a plaque.

I believe I was able to do the kind of job that would call for these compliments because I loved my job. I gave my heart to my job. I tried to do everything I could for the Senators, the staff, the public who came in, and my coworkers. As one of

the Senators mentioned in his tribute to me on the Senate floor, I always tried to be friendly, courteous, polite and helpful to everyone. During 20 years of service, I only missed a total of 51 days and 80 hours of that was taken—lose it or take it. For 20 years, I drove in every day all the way from Baltimore.

Being forced to retire has been a real hardship for me. Since this law passed in 1990 and I had to retire in January of 1994, I had very little time to prepare for my retirement, because I had to retire so much earlier than I had intended. I now have to make house payments, car payments, and pay other bills on a retirement pension that is half the salary I was making before. I used to try to help out my sister and niece, who are in real financial need, whenever I could, but now I don't have the money to do that. I also give money to the church, but I am having trouble doing that now too.

I am suffering emotionally, as well as financially. I miss my job and my co-workers. I miss being in the Senate and I miss the Senators. I am working part-time now directing traffic for school-children, but it isn't the same.

I would very much like to be back at work in the Senate. I do not believe this law that forced me to retire is fair. I believe it is age discrimination. If I wasn't able to work, that would be a different story. But I am able; so I think it's wrong.

Senator METZENBAUM. Well, I want to say to you, Mr. Monroe, that first of all, I did not know there was a party when you retired, or I would have been there, because you really acquitted yourself extremely well, and it is obvious that other members of the Senate felt the same way.

Mr. MONROE. Thank you, sir.

Senator METZENBAUM. Now, let me ask you this question. Are you in good physical shape?

Mr. MONROE. Yes, sir. I am not on any medication. I had a physical about 2 months ago, and the doctor says I am doing fine. At my part-time job with the school system, I stand for about 3 hours in the morning and 3 hours in the evening; I have no problems with my legs, except for a few aches and pains, which come with age. As far as any limitation in my body or anything like that, I just thank the Lord that I am in good physical condition.

Senator METZENBAUM. Did any of your superiors or fellow workers indicate to you that you were not physically fit to hold the job? Were you given any tests or anything that indicated that you could not pass?

Mr. MONROE. No, sir.

Senator METZENBAUM. All they said is, "You are too old. You are out"?

Mr. MONROE. Right, sir. And Mr. Chairman, about 3 years before 20 years of employment, the U.S. Capitol Police will send you a letter saying that you are being involuntarily retired because you will have 20 years on this date, and you must leave on this date. That is the way the letter is phrased, and I have a copy of the letter. So my date of 20 years was January the 7th of 1994, so the letter said that I would have to leave the department by January the 31st of 1994, that is, by the end of the month.

Senator METZENBAUM. Thank you very much, Mr. Monroe. I think that it is a real travesty to put you out to pasture in this manner.

Mr. MONROE. Thank you, Mr. Chairman.

Senator METZENBAUM. Captain Robert Devereaux, of the Massachusetts State Police Department in Boston, we are happy to have you with us.

Mr. DEVEREAUX. Senator Metzenbaum, if I may defer to my attorney first, and I would speak after him, sir, if I could.

Senator METZENBAUM. Fine.

Mr. DEVEREAUX. Thank you.

Mr. CONROY. Thank you, Mr. Chairman.

My name is James B. Conroy, and I am a partner in the Boston law firm of Donnelly, Conroy & Gelhaar.

Captain Devereaux and I are here this morning representing over 100 Massachusetts State police officers. We appreciate this opportunity to participate. We are particularly grateful to Senator Metzenbaum for inviting us, and I may say, deeply grateful, Senator, for the remarks you made in opening this hearing.

We are also particularly grateful to Senator Kennedy for considering my client's plight with great empathy and concern.

The dedicated officers whom I represent face the end of their careers, 10 years before their time, because a Massachusetts statute arbitrarily cut their retirement age from 65 to 55, for no better reason than administrative convenience. What has happened to them is unique in its details, but the essence of their experience may soon be replicated nationwide if this legislation is permitted to be enacted into law.

In 1992, the Commonwealth of Massachusetts consolidated four law enforcement agencies into a single, newly-reconstituted State Police. My clients belonged to the abolished agencies. They now serve as Massachusetts State Police officers, performing precisely the same duties that they performed before. Indeed, in their old jobs, they often joined the State Police in a variety of hazardous missions, riot control, and so forth. The consolidation changed little more than the color of their uniforms and patrol cars.

But before the consolidation, these officers were retired at age 65. Suddenly, with the consolidation, they were forced to retire at 55. None of them were tested individually for their physical fitness, ability, skill or leadership qualities. With the stroke of a pen, they were declared unfit based on no evidence whatsoever.

For over a century, this same class of officers had retired at 65, and the notion that it was suddenly necessary to retire them 10 years earlier was indefensible on its face.

Invoking the Age Discrimination Act, we challenged that action in the Federal court in Boston. Finding that the officers were reasonably likely to succeed on the merits of that lawsuit, and that they would suffer irreparable harm without an injunction, and that their plea for such relief was in the public interest, the court did enjoin their forced retirement under the Age Discrimination Act. The First Circuit Court of Appeals has upheld that ruling.

We are now preparing for trial, Senator, with overwhelming evidence that there is no need to retire these officers 10 years before their time, and we are convinced that only the legislation before this committee can prevent that result from taking place in a court of law.

All of this illustrates why this legislation is so undesirable. Legitimate interests are well-protected under the ADEA's existing language. Cities and States can already retire police officers at any age merely by showing that it is "reasonably necessary" for them to do that. There is no good reason to excuse them from carrying that burden and many good reasons to require them to carry it.

Congress would have no patience with the notion that cities and States should be immune from suits alleging racially-biased employment practices merely because lawsuits are inconvenient or because the Federal Government should defer to the States on matters of that sort.

Public employers who practice indefensible age discrimination are entitled to no greater deference. Baseless prejudice is all the more odious when inflicted on citizens by the very officials who are responsible for protecting them from it.

In banning job discrimination based on race, age, gender, or handicap, Congress has established that American workers ought to be hired and fired not because of what they are but because of what they can do. Thus far, my clients have been able to invoke that principle only because the ADE is there to protect them. American police officers are entitled to no more and no less of that protection than any other citizen. For that reason, Senator, we do support your position.

I would also, if I may, Sir, offer for the record a letter to Senator Kennedy as chairman of the full committee from the executive director of the Massachusetts Police Association, which represents 17,000 Massachusetts police officers statewide, and which is firmly in support of our position on this legislation, and also a letter from the Massachusetts State Police Commissioned Officers Association, which consists of State police officers both pre and post consolidation, lieutenants, captains, majors, and other senior officers, and the president of that organization has written a letter here, strongly reporting to this committee that officers over the age of 55 are fully capable of performing those duties.

Thank you very much, Senator.

Senator METZENBAUM. Thank you very much for a good statement.

[The prepared statement of Mr. Conroy follows:]

PREPARED STATEMENT OF JAMES B. CONROY, ESQ.

My name is James B. Conroy. I am a partner in the Boston law firm of Donnelly, Conroy & Gelhaar. Captain Robert Devereaux and I are here this morning representing over 100 Massachusetts State Police officers. We very much appreciate this opportunity to contribute to the debate on H.R. 2722 and its impact on our society. We are particularly grateful to Senator Metzenbaum for inviting us here and to Senator Kennedy for considering my clients' plight with empathy and concern.

The dedicated officers whom I represent face the end of their careers, ten years before their time, because a Massachusetts statute arbitrarily cut their mandatory retirement age from 65 to 55 for no better reason than administrative convenience. What has happened to them is unique in its details; but the essence of their experience may soon be replicated nationwide if the Age Discrimination in Employment Act is amended to deny police officers the same defenses against invidious age discrimination that other Americans enjoy.

In 1992, the Commonwealth of Massachusetts consolidated four separate law enforcement agencies into a newly reconstituted Department of State Police. My clients are former officers of the agencies that were abolished. They now serve as Massachusetts State Police officers, performing precisely the same duties that they performed before. Indeed, in their old units, they often joined the State police in a variety of hazardous missions. In practical effect, the consolidation changed little more than the design of their uniforms and the color of their patrol cars.

Before the consolidation, the officers I represent were permitted to work until age 65. Suddenly, as part of the consolidation, they were forced to retire at age 55. None of them were tested individually for their fitness, skills, or ability. With the stroke of a pen, officers who had served with distinction until age 65 were declared unfit at age 55, based on no physiological evidence and no field experience whatsoever.

On the contrary, given the fact that, under rules in effect for over a century, the same class of officers had retired at age 65, the notion that it had suddenly become necessary to discharge them ten years earlier was indefensible on its face.

Invoking the Age Discrimination in Employment Act, we challenged that action in Federal District Court. Finding that the officers were reasonably likely to succeed on the merits, that they would suffer irreparable harm absent injunctive relief, and that their plea for such relief was in the public interest, the court enjoined their forced retirement until the case could be tried. Eight months later, the First Circuit Court of Appeals upheld that decision. We are now preparing for trial with overwhelming evidence that there is no reasonable necessity to retire these officers ten years before their time. Indeed, we are convinced that only an amendment to the ADEA that would strip them of any protection whatever can keep them from prevailing.

All of this illustrates why such an amendment is so plainly undesirable. Legitimate interests in preserving public safety are well protected under the ADEA's existing language. Cities and states can already retire law enforcement officers at any given age, merely by demonstrating that it is "reasonably necessary", to do so. There is no good reason to excuse them from that burden and many good reasons to require them to carry it.

Surely, neither principles of federalism nor an understandable desire to minimize litigation lend public employers a persuasive argument. Congress would have no patience with the notion that cities and states should be immune from suits alleging racially biased employment practices merely because lawsuits are inconvenient, or because the Federal Government should defer to the states on such matters. Public employers who practice indefensible age discrimination are entitled to no greater deference. Indeed, invidious prejudice is all the more odious when it is inflicted on our citizens by the very officials who are responsible for protecting them from it.

In banning job discrimination based on race, age, gender, or handicap, Congress has established the fundamental principle that American workers ought to be hired and fired not because of what they are but because of what they can do. Thus far, my clients have been able to resist arbitrary age discrimination only because the ADEA is there to protect them. The ADEA does nothing more than require public employers to prove that forced retirements are reasonably necessary before they can impose them with impunity. American police officers are entitled to no more and no less of that protection than any other citizen.

[Editors note—The additional material supplied by Mr. Conroy appears at the end of the hearing record.]

Senator METZENBAUM. Captain Devereaux, do you have a short statement to add to that? We have a 5-minute limit, as you know.

Mr. DEVEREAUX. Yes, Senator. Thank you. Good morning, Senator Metzenbaum, Senator Wellstone.

I am Captain Robert Devereaux of the Massachusetts State Police. Based on my own personal experience, I am here to tell you, with great respect, that H.R. 2722 is bad legislation, not only for the senior police officers who are most directly affected by it, but for all Americans who want to preserve the unique contribution to public safety that those officers are making and have always made.

First, let me thank you for allowing me to appeal to your sense of fairness and reason and present a personal perspective on a form of age discrimination that has traumatized me, my wife, my children, and many of my fellow officers and their families.

I am 56 years old, with nearly 30 years of law enforcement training and experience. In 1966, I enlisted as an officer in the Metropolitan District Commission Police, the State law enforcement agency that was responsible for policing large areas of Boston and surrounding communities.

Over the years, I advanced through the ranks of patrolman, sergeant, lieutenant, and captain. I have earned a master's degree in criminal justice. I have been assigned to investigations, been a court prosecutor and liaison, and director of the police academy.

At the time I turned 55, I commanded a district consisting of three lieutenants, five sergeants, and 42 troopers. After my 55th birthday, I continued to make command decisions, doing my job exactly as before, and sometimes under hazardous conditions.

In November of 1992, I commanded a large contingent of State police officers who had been called upon to disperse a crowd of unruly youths. Using my experience and my judgment, I made decisions and gave orders designed to contain the situation, not to enflame it.

I have served as watch commander during several recent blizzards, working in gale winds and blinding snow for 14 hours at a stretch, making command decisions to close down roads, rescue stranded motorists, and evacuate residents from flooded homes. I regularly serve as a night watch commander, the most senior State police officer on duty during the midnight to 8 a.m. shift, when criminal activity and other law enforcement challenges are at peak levels.

After turning 55, I have responded to all of these critical situations with the same energy, initiative, and efficiency as ever, but with far more experience, training, and seasoned judgment than I had as a younger man.

Throughout my career, I have served side-by-side with senior officers older than 55 in riots, emergency evacuations, and civil disturbances of all kinds, ranging from violent antiwar demonstrations in Harvard Square to school bussing disturbances in South Boston, to violent racial confrontations at Carson Beach, and to prison uprisings at Charles Street Jail.

When I was a young police officer, I learned from those older, more experienced men that sheer force and raw power are not the answer to most law enforcement problems. I have learned that domestic disputes are best resolved with a calm voice and a soothing tone while quietly pushing away kitchen knives out of harm's way. I learned, when stopping a car driven by a man who has his children with him, to preserve his dignity by asking him to step outside the car while you lecture him for speeding or write him a ticket. I learned when it was necessary to disperse an angry mob with riot sticks and shields, but also when it is possible to defuse it with patient control.

In my own time, I have taught these things and more to younger officers who have served under me.

When the MDC Police merged with the Massachusetts State Police, I was 55 years old. Although I had enlisted and served for 28 years under a set of rules that allowed me to continue in my career until reaching the age of 65, I was suddenly informed when the merger occurred that I would now be forced to retire — 10 years before I had planned and expected to do so — merely, merely because I was 55 years of age.

At no time did anyone test my physical fitness, although I jog, work out, lift weights three times a week, and bench press 300 pounds. I defy anyone—anyone—to tell me that I am not physically capable of performing my duties, or that younger, less experienced, less mature officers are more capable than I am of making command decisions simply because their birth dates are later than mine.

Is it not a waste of highly educated, experienced, and trained personnel to force a man to retire because he has reached his 55th birthday? Is it wise to do away with our most experienced and seasoned manpower at a time when the number one issue on the public's mind is not health care, or Bosnia, or the Whitewater story, but the high rate of crime?

I understand that H.R. 2722 may be added to the crime bill in the House of Representatives. A crime bill that increases the number of rookie police officers on the one hand, while doing away with our most experienced veterans with the other, is not the answer.

My wife, my children and I are a family of seven. Since we learned in 1991 that the Commonwealth of Massachusetts intended to force me out of my job 10 years before my time, we have lived with physical, mental, and emotional stress that has taken a tremendous toll.

Like many middle-aged people, my wife and I are just entering the time when our financial responsibilities to our children are highest. We have five sons and daughters ages 16 to 20. Four of them are in college this year. In 1995, all five will be in college. Two of our boys are dyslexic and require special education and tutoring, which results in an even greater financial burden, not to mention the emotional stress.

We had planned to do all that we possibly could to give our children a good foundation in life by helping them through college—an overwhelming undertaking even in the best of circumstances. Facing the prospect of my forced retirement, do we now commit ourselves to the 1994 tuitions or not? If so, how will we pay for them if I lose my job? Do we tell our children that we will not be able to help them with their educations, or do we hope that we will get through this crisis?

We are grateful to the Federal court for enjoining the Commonwealth from forcing me out of my job. But as we wait for Congress to decide whether to amend the ADEA, and as we wait for our trial to be held, our lives are on hold. I find myself in the discouraging and demeaning position at work, being labelled only as a "special" State Police officer pending the outcome of these things.

I am in an insecure and unstable situation with my family and my financial commitments. I am in the devastating position of facing an unplanned-for, unexpected, and utterly premature retirement at a time when I can give so much to my job, my fellow officers, and my community, and when I want to give so much to my children.

I am from a family steeped in the tradition of police work as a career. I have sons who want to follow in my footsteps and in the footsteps of their grandfather, uncles, and cousins going back for generations. This is my life as well as my livelihood.

With great respect, I appeal to the Congressmen and Senators who are dealing with this issue to permit me, my fellow officers, and thousands of others like us to continue to do the job that we were trained to do, love to do, and are most capable of doing. We are proud of our jobs and proud of our ability to do them well.

We do not ask to be immune from scrutiny. Test our physical fitness. Judge our records. Assess our character. Measure our leader-

ship ability. But please do not judge us by the dates when we were born.

In addition, Senator, I just want to say that recently, I was given 100 percent on my yearly evaluation from my superiors even though I am over 55.

Senator METZENBAUM. Thank you very much, Captain Devereaux.

I am going to change the order of this hearing a little bit because we have two members of the committee with us, one of whom I am not sure can bench press 300 pounds, Senator Wellstone, and the other one of which I am sure can bench press 300 pounds, Senator Thurmond.

Senator Thurmond, do you have an opening statement that you would like to make at this time?

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, it is a pleasure to be here this morning to receive testimony concerning H.R. 2722, the Age Discrimination in Employment Amendments.

I would like to join my colleagues on this subcommittee in welcoming our witnesses here today. We thank all of you for coming.

This legislation will amend the Age Discrimination in Employment Act of 1967, which made it illegal for an employer to discriminate against an employee between the ages of 40 and 65 on the basis of age. It would set the retirement age for fire fighters and law enforcement officers at 55 years of age, unless there is a requirement concerning age of hiring and retirement in effect under applicable State or local law on March 3, 1983.

Essentially, this measure would repeal a provision of the Age Discrimination in Employment Amendments of 1986, which would have terminated an exemption for hiring and retirement plans applicable to State and local fire fighters and law enforcement officers. It would allow States and localities to set employment and retirement age limits for fire fighters and law enforcement officers.

I believe men and women can continue to work in many capacities beyond any given age. However, I also believe police work and fire fighters demand unique mental and physical abilities. I am glad we are considering this exemption for the health and safety of our front line forces and the community.

The study for guidelines and performance tests is an important part of this legislation. It will ensure that the chairman of the Equal Employment Opportunity Commission carefully examines the exemptions extended to public safety officers.

Again, I would like to welcome our witnesses here today and look forward to their testimony.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Thurmond.

Senator Wellstone.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Mr. Chairman, I have the flu and cannot talk today, so everyone is blessed.

I just came to listen for a little while, and if I leave, it is only because I am under the weather.

I thank you all, each and every one of you, for being here.

Senator METZENBAUM. Well, I am grateful to you for being here, and please leave if you need to. I went through that flu period myself, and I know how it is.

Let us go on to the next witness, Mr. Sam Cabral.

Please proceed, Mr. Cabral.

Mr. CABRAL. Good morning, Mr. Chairman.

I wish to thank you for the opportunity to present labor's position on the amendment.

I am Sam Cabral, international secretary-treasurer of the AFL-CIO International Union of Police. We represent over 300 local, county, State and Federal law enforcement agencies throughout the Nation.

I appear before you today on behalf of our members to urge the committee to give careful consideration to H.R. 2722, the Public Safety Officers Exemption and support its passage into law.

As you are aware, the 1986 Employment Act Amendment exempted public safety occupations from the ADEA for a period of 7 years, during which time a study was conducted to determine the exemption's validity. Based on the results of that study, the House of Representatives voted unanimously last year to retain the ADEA Public Safety Exemption.

The Age Discrimination in Employment Act has provided important protection for workers throughout this Nation. I feel law enforcement personnel, along with other public safety employees, occupy a unique place in this Nation's work force. The day-to-day duties, often interspersed with crises that threaten their lives and the security of their families, take a serious toll.

Unlike any profession in America, the physical and psychological pressures of the job are cumulative, building up over the years. Regardless of changes in job assignments through promotion or training, the pressures of police work never truly fade away.

There are no specific tests that can adequately measure the stress-related consequences that can predict long-term fitness for duty. Police work is not just a question of how fast or far an officer can run, or how keen his eyesight is on the firing range. It is a matter of long-term stress eroding the body and the mind's capacity to continue to function at peak performance.

After a full career in dealing with society's myriad and complex problems, and upon reaching an age where most Americans actually look forward to retirement, law enforcement personnel need and deserve the relief and security of safe and comfortable early retirement. They have earned it, and the public must be prepared to rely upon new personnel coming up the line to continue their colleagues' tradition if the public safety is to be ensured.

In addition to the cumulative pressures of a high-stress career, the function of police work is ever changing. We have an entire generation of police officers nearing retirement, who are working in

an environment that is radically different from that in which they began their careers. By requiring law enforcement personnel to retire at a reasonable age, the way is paved for younger, fresher, and differently trained officers to take their place, bringing with them techniques to meet the unique demands created by societal changes. Influences ranging from dealing with an expanded drug culture to the sophisticated nuances of developing community policing programs and the growing diversity in the ethnic and cultural makeup of so many communities demand a fresh approach, and that in turn require making room for fresh personnel.

Additional demands, such as those triggered by equal opportunity laws and policies, will be best-served by mandatory retirement requirements. Officers working long after it is advisable for them, their families, or appropriate for public safety precludes the hiring and promotion of younger officers for these important categories.

It is unclear whether the Federal Government recognizes these factors when they practice mandatory retirement with Federal fire fighters and law enforcement personnel, yet prohibit such retirement policies for similar personnel who happen to be employed by State, counties, and municipal governments.

The personal toll exacted from an officer in a Federal agency is no different than that exacted from a city cop or fire fighter. The pressures are the same, the effect is the same. To exempt all law enforcement and other public safety personnel from a prohibition on mandatory retirement is consistent with both Federal policy toward its own employees and consistent with the intent of the ADEA itself. We are not asking for a change in the basic mandate of the ADEA, but simply a permanent affirmation of the existing policy that expired in December of 1993.

None of this should be interpreted as a failure to recognize the contributions made by so many career law enforcement professionals over the years; nor does that mean the experience is lost to a younger generation. Every day, experienced officers will still be in the ranks of command and available to guide younger officers. Instead, the mandatory retirement should be viewed as saying to these public servants, "You have done your job well and spent your career committed to the public good. Now it is time for you to accept the gratitude of the public and pursue a safer and more comfortable life." Once retired and free of the stresses and demands of law enforcement, they can at their discretion assume other roles in their respective communities, continue to contribute their hard-earned expertise to the public good, and enjoy greater safety and security for themselves and their families.

I urge the support of H.R. 2722, Mr. Chairman. I have other concerns on the aging police officer. In my experience, I came from a smaller department, Senator, and there was no place to put officers for light duty. My concern is where do we put officers for light duty when they stay until they are 70, 75 or 80 years old, and when do officers resort—instead of becoming physically confrontational with today's violent criminals, do we then rely upon our service revolvers to settle those disputes quicker than we would when we were 35 or 50 years old?

Those are some of my grave concerns at this point.

Thank you.

Senator METZENBAUM. I think I will hold my questions for all of the witnesses until I have heard the complete panel.

Deputy Chief James Weston, of the Reno Police Department, Reno, NV.

Mr. WESTON. Thank you, Mr. Chairman.

My name is Jim Weston, and I am the deputy chief of police in the city of Reno, NV. I come from a city of about 150,000 residents, with a police department of about 500 employees, 300 of whom are sworn police officers.

In the city of Nevada, there has never existed any mandatory retirement system for employees, and our employees can voluntarily retire at the age of 50 if they have 20 years in the retirement system. To ensure that all of our employees are physically and mentally fit to complete their duties as police officers in the city, we maintain what is called a series of critical performance standards of our employees, and we test them on a yearly basis to see if they can do their jobs. The standards apply to every police officer from the rank of patrolman up to deputy chief of police and apply from the day that you are hired until the day you leave employment.

Unlike many police departments throughout the country, we do not have any light-duty assignments that we can pigeonhole or put officers into who cannot do their jobs in the street. In fact, over the last 3 years, we have pretty much civilianized every clerical job that there is because of budget constraints, and the only police officers we have left must come to work and do jobs as police officers. We do not have any room for light-duty assignments.

Those officers who are not able to complete our physical and mental testing every year go through an immediate process of mediation and rehabilitation, or if they cannot be rehabilitated, they are actually started into the process of termination for cause.

Certification testing occurs on an annual basis, and we have a large number of different categories we test on, but in the interest of time, I will just mention three of those very briefly here today.

First of all, when officers are actually recruited for the police department, they go through a physical agility test as part of their entrance examination. That test requires the applicant to perform a number of simulated job tasks such as dragging a dummy across a field, climbing over a fence, running a certain distance to pursue somebody, and putting handcuffs on individuals to see if they have the basic skills to do the job.

Once they are hired and start the police academy, each applicant begins a rigorous aerobic fitness training program which includes running two or three miles a day, and a number of exercises to bring themselves up to a heart fitness level and a basic overall fitness level that is consistent with the standards we have in the police department.

Once they are actually hired and they go to work, every year each employee must undergo a rigorous physical fitness and health examination which includes a stress EKG treadmill exam, a lung capacity exam, a vision test, a hearing exam, body fat examination, and an entire complement of different medical tests to see if they are maintaining their physical abilities as well as their fitness abilities.

The fitness portion of the test includes doing pushups, situps, bench press, flexibility stretching, and a number of exercises to see if you have the strength to actually do your job.

After each employee finishes their annual test, they are placed into fitness categories. They receive a numerical score from the fitness exam. They also receive a coronary heart risk factor score from the medical exam to determine their level of health. Any employee who falls below certain standards in any of these tests can begin a process of remediation or termination if he does not bring his scores up to standard.

The testing process was developed by management employees as well as union employees in conjunction, and they are based on Dr. Kenneth Cooper's Institute for Aerobics Research in Dallas, TX.

In order to make sure employees make fitness a daily activity, we have an in-house fitness center with a full Nautilus setup, a number of exercise equipment items, an entire facility that was built by the employees themselves and the city of Reno.

Several staff members in the department have been trained to design and monitor workout programs for all employees and administer the fitness tests on a yearly basis.

All the police officers have to participate in this process, but our supervisors, the older employees, also receive a pay incentive to maintain their health at the highest fitness levels.

I myself, for example, am in the highest fitness standard for the department, so I get an extra \$55 in every pay period to ensure that I keep maintaining my fitness program. So there is an incentive there to do that.

Another one of the critical task performance areas that we have is called the weaponless defense program. Each year, our officers receive refresher training, and they must take a comprehensive written examination and a physical examination demonstrating they can actually apply all the techniques you have to use to control people in the field—for example, a carotid neck restraint hold, a "hair pull" take-down, struggling and fighting with individuals. You have to test yourself in front of a panel of trainers each year to see if you can do these examinations.

We find that this part of our testing program is the most rigorous and complex, and most of our officers who are on light duty or approaching light duty or unfit status normally retire or resign because they cannot complete the test process.

The benefits from the program overall outweigh all the costs that we have put into it over the last few years. For example, the overall level of coronary heart disease of our employees is very good, and we have good control of it. We have several walking testimonials from employees where we detected early on that they had heart problems, and we were able to correct those and prevent them from having major incidents in the field such as a heart attack.

Worker compensation claims have been reduced significantly over the years as employees know there are no light duty assignments, and they have to do their jobs or get out of the department.

Sick leave usage has also declined because healthy employees take less time off, and they have an outlet through the fitness pro-

gram other than alcohol or possibly drugs to deal with stress on the job.

To summarize, many in the field of policing agree that public safety employees should be judged solely on their ability to do their jobs, rather than non job-related criteria such as race, gender, or age. In fact, 73 percent of the Police Executive Research Forum members last year in a poll believed retirement decisions should be based solely on performance and not on age.

I believe law enforcement administrators should take more responsibility for setting and maintaining fitness and health standards for their employees from the day they are hired. Simply claiming that older employees become less fit and in turn lower the fitness standards that can be set for entry-level employees does not make a lot of sense to me.

I think it would be fairly safe to say that many typical young police officers are out of shape, overweight, and are a walking heart attack risk. Mandatory retirement does nothing for those officers.

There is no question that a good fitness program takes years of effort to develop, and there is no question there is going to be considerable labor resistance to doing so. But there is also no question that administrators and law enforcement should be considering other factors other than age as reasons for having a fitness program—primarily liability for the actions of your officers in the field. If you cannot do your job, are not trained, are not supervised, or are unfit to do it, you can be sued from the liability perspective.

In closing, my position is that law enforcement has a duty to maintain the fitness, health, and competence standards of its employees.

Thank you.

[The prepared statement of Mr. Weston follows:]

PREPARED STATEMENT OF JIM WESTON

Reno is a City of 150,000. Its police department is staffed with 500 employees, 300 which are sworn police officers. Mandatory retirement of police or fire personnel based on age has never existed in the State or the City. There are no maximum age limits for entry hiring and retirement is purely voluntary as early as 50 years of age with 20 years of service. To insure employees of all ages are mentally and physically fit to perform their duties, the Reno Police Department mandates a series of critical task performance standards and tests employees annually to insure compliance. The standards apply to officers of all ranks from patrolman to police chief and are in effect from the day they are hired until they leave employment. They were originally designed to protect the City from liability exposure for the actions of its employees (claims filed by employees as well as citizens) while insuring officers were able to perform their duties.

RENO'S PERFORMANCE CERTIFICATION SYSTEM

Unlike many agencies throughout the country, in Reno there are no light duty work assignments to pigeon hole officers who are not mentally or physically fit for full duty. Every possible desk job or clerical assignment has been civilianized and filled by lower paid personnel requiring each sworn officer to be fully certified to perform field work. Those who fail to meet annual certification tests to determine fitness and competence automatically begin a path of remediation, rehabilitation, or, as a last resort, termination for cause. This process encourages our employees to recover from injuries, stress, and substance abuse problems as quickly as possible - or face the eventual possibility of termination or workers comp reclassification to another job. Certification training and testing occurs on an annual basis. It includes an examination which may consist of practical applications of techniques, written tests, and oral inquiries. Some of the certifications include:

Recruit Police Officer Hiring: A battery of tests for new applicants includes a physical agility examination based on a series of simulated job tasks a police officer would be required to perform. Recruits are also required to complete a lengthy and strenuous aerobic fitness training program to bring them up to current police department fitness standards.

In Service Fitness Testing must be completed annually by each employee to maintain full duty status. Testing occurs in conjunction with an annual heart/lung medical exam which includes a stress EKG treadmill, lung capacity, vision, hearing, body fat measurements, and fitness strength tests (pushups, situps, a bench press, flexibility stretching, etc.). A numerical score results from the testing to place officers in a coronary risk category and a fitness level. Failure to meet minimum standards in any critical area will result in remediation. Supervisor employees who repeatedly fail to meet health and fitness standards can be terminated for cause. Management and employee unions designed the fitness program based on fitness and health risk standards established by Dr. Kenneth Cooper's Institute for Aerobics Research in Dallas, Texas. To make fitness a daily activity, an in-house fitness center equipped with full Nautilus equipment and a host of the latest exercise equipment was constructed by employees and the City. Several staff members have been trained to design and monitor workout programs for employees as well as administer the fitness tests to each employee annually. All police officers must participate in the program, however, supervisors have negotiated pay incentives based on how high they place on the scale. An extra \$55 per paycheck is available to the most fit employees.

Weaponless Defensive is probably the most complex annual recertification class. Officers are given refresher training each year and must complete proficiency testing in the use of a variety of physical control techniques from "hair pull" take downs of suspects, to the use of a carotid neck restraint on violent suspects. Testing requires the officer to be subjected to the technique as well as applying it to others. This area is the most difficult for injured or unfit officers to complete and frequently result in early retirements or resignations.

Weapons Handling which is a bi-monthly handgun and shotgun qualification. Officers are subjected to judgement scenarios in which they must assess situations quickly decide if they should shoot or not. These are not simply target practice sessions, but force the officer to make judgement decisions as they would in the field.

Emergency Vehicle Operation is one of the most critical areas of officer performance and liability exposure. Beginning this year, officers are being trained and tested to insure their ability to react and comply with emergency vehicle pursuit policies.

Psychological Testing by Incident for Trauma. Officers are required to submit to psychological evaluations for fitness after any traumatic incident (i.e., shooting, use of force causing injury, serious vehicle accident involving officer). Supervisors can direct psychological fitness examinations based on articulated substandard performance of an employee.

Peer Counselling has become an important element of monitoring employee fitness for duty. Officers can voluntarily seek out a number of fellow officers trained as peer counselors to confidentially discuss family problems, job stress, substance abuse, or other difficulties which normally have an impact on performance. The peer counselors have a host of referral services available to offer the employee. Labor unions and the Police Department pay for much of the treatment services.

THE BENEFITS

Fitness and health standards provide benefits which far outweigh the costs of the programs:

Coronary Heart Disease is detected very early and controlled. Several employees have had emerging heart problems detected during the annual testing process which without question has prevented heart attacks in the field.

Worker comp claims have reduced significantly as employees know there are no light duty assignments and that termination may result from disability. Preventive medicine and the fitness programs has kept employees on the job longer.

Sick leave usage has declined over the years. Healthy employees take less time off. Alcohol and drug related problems are minimal as employees have outlets for stress and are monitored by management.

Exposure to liability for negligent training and use of force actions has been significantly reduced during the last five years. When litigation in these areas does occur, the claims are much easier to defend.

Fitness Pay Incentive for supervisors realistically costs nothing considering the employer negotiates annual cost of living raises each year. It has been more beneficial to offer the pay as a fitness incentive rather than a cost of living adjustment.

SUMMARY

To summarize, many in the field of policing agree that public safety employees should be judged solely on their ability to do their jobs rather than non job related criteria such as race, gender, or age. In fact, 73 percent of Police Executive Research Forum members, according to a recent poll, think police retirement decisions should be based on performance, not on age. I believe law enforcement administrators should take more responsibility for setting and maintaining fitness and health standards for new officers from the day they are hired. Simply claiming that older employees become less fit and, in turn, lower the fitness standards that can be set for entry level employees does not make logical sense. I think it would safe to say than many typical young police officers are obese, out of shape, and walking heart attack risks. Mandatory retirement does nothing for those officers. With older officers, the Penn State Study has found little correlation between age and having a major catastrophic medical event while on-duty. There is no question a good fitness maintenance system takes years of effort to achieve, and there is no question considerable labor and management resistance will exist when efforts are made to implement such systems. But, there also is no question that law enforcement administrators should consider fitness and competence testing of employees for other good reasons—such as civil liability protection from the actions of their police officers when doing their jobs. It's time law enforcement as an employer take responsibility training and maintaining critical job skills of its employees.

Senator METZENBAUM. Thank you very much, Mr. Weston.

We are very happy to welcome Major Owens, who is the author of this amendment in the House. I will have some questions, but first, Congressman Owens, did you have a statement?

Mr. OWENS. Go right ahead, Mr. Chairman.

Senator METZENBAUM. First, let me just summarize for you that Mr. Leon Monroe, the gentleman on the left, worked for the Senate for over 20 years. They had a party when he left, and many Senators took the floor to indicate how sorry they were that he was leaving.

He is able-bodied, full of vigor and energy, and was forced to quit by reason of the Senate rules or the rules affecting people in Government. I have a bill to change that.

Captain Devereaux, of the Boston Police Department, says that he is in great physical shape, can bench press 300 pounds, jogs, and knows how to lead his troops and his team. He has been involved in just about every activity a police officer could be involved in, and he has a case pending through his lawyer, Mr. James Conroy, sitting next to him, to enjoin the State of Massachusetts from forcing him to retire.

Mr. Cabral, you probably know, is an international secretary-treasurer of the International Union of Police Associations, AFL-CIO, and he strongly supports your position.

And Deputy Chief James Weston is here with us, indicating that in Reno, they do not have compulsory retirement, but they do have some pretty stringent provisions with respect to keeping up physically and being physically fit to do the job.

Captain Devereaux, how long have you been with the department?

Mr. DEVEREAUX. With the merged department, over a year and a half, Senator; but I have 30 years' experience as a police officer.

Senator METZENBAUM. Have you found that you or those who have worked with you all of a sudden become unable to perform by reason of the fact they have reached a particular age?

Mr. DEVEREAUX. Well, Senator, all I can say is I turned 55; I am still alive, and I am doing the job, and I received 100 on my evalua-

tion from my superiors, so obviously, they must think I am doing the job pretty well.

Senator METZENBAUM. Do you think you are as capable as some 35- or 45-year-old police officers to do the job?

Mr. DEVEREAUX. I certainly do. As long as I keep myself in good physical and mental condition, I think I can do the job as well as anybody.

Senator METZENBAUM. What will you do if you have to retire? Will you be a crossing guard at the school, like Mr. Monroe, or have other very exciting job like that?

Mr. DEVEREAUX. I do not even like to think about it, Senator. This is my life. It is all I ever wanted to do in my life. I have worked hard. I received my master's degree in law enforcement. That is what I know, that is what I am good at, and that is what I always want to be.

Senator METZENBAUM. Mr. Cabral, the police officer associations and the fire associations have known for 7 years that the exemption was due to expire on December 31st, 1993. As I said in my opening remarks, you made a deal, and I believe you ought to be as good as your word—you made a deal, and you ought to live up to your deal, particularly if your police officers and firemen are a part of Government. I think once you agree to something, you ought to stay with it.

What I want to ask you is what did your organization do for 7 years to consider alternatives to mandatory retirement?

Mr. CABRAL. Senator, we thought that the study that was presented, or the Department of Labor having passed this on to Penn State, that they were going to come out with a battery of tests or a standard of tests whereby we could follow those tests and go with that study from Penn State. But when we received those studies and found that there is no standard and that it is left to litigation of every type—

Senator METZENBAUM. They do not have any litigation in Reno. What is the matter with following their procedure?

Mr. CABRAL. I do not know that all departments, Mr. Chairman, have the facilities and the money to back their positions as they do in Reno. It sounds like they have got a pretty good system in Reno. But based on a lot of the 25-and 30-man departments that I represent across the United States, I do not think the money is there for a setup like in Reno.

Senator METZENBAUM. Let me ask you this, Mr. Cabral. You are part of the AFL-CIO.

Mr. CABRAL. Correct.

Senator METZENBAUM. Now, police officers have some hazardous work that they do, and fire fighters do as well. But many construction workers have hazardous work, too, when they walk across those girders, or when they work on tall buildings; window washers have hazardous work; electrical people go up on telephone poles, as do members of the CWA. All of that seems to me to be pretty hazardous. And yet there is no mandatory retirement with respect to any of these fellow unions in the AFL-CIO.

Do you think we ought to have mandatory retirement for everybody in any kind of hazardous work?

Mr. CABRAL. No. We feel that law enforcement and safety divisions and fire fighters are unique to those positions.

Senator METZENBAUM. Unique, compared to a telephone worker, who is up 100 feet in the air and can fall if he is not steady; unique compared to a construction worker who walks across those steel beams high up in the air—that always looked to me like pretty scary work, and there is no compulsory retirement there.

Why compulsory retirement here? Is it just because the younger officers want to push out the older officers? Is that really the reason?

Mr. CABRAL. I would hope not.

Senator METZENBAUM. Well, I would hope not, too, but I cannot find any other reason. I find two things offensive about your position—and I respect the fact that you are speaking for your organization, and you have to take that position. But there are two things that I find offensive. One is that you made a deal. You made a commitment. We gave you an exemption for 7 years, and to the best of my knowledge, none of the police departments around the country did a damn thing about it to see what kinds of tests ought to be used, such as Reno has, such as other places have, but instead of that, sat back and said, we will use our political muscle 7 years later, and come back and get the exemption extended, or get it eliminated entirely.

You did not do a damn thing about it for 7 years, and you made a commitment.

The second thing is that to me it is offensive, to look at any particular group of people, whether they are minorities, whether they are religious groups, whether they are women, whatever the category, and have this kind of discrimination. The whole thrust of the Age Discrimination in Employment Act is to prevent discrimination, and the AFL-CIO supported it, and you are one of the constituent organizations.

We gave you an exemption 7 years ago so that you could work it out. You said you had some problems you wanted to work out. To the best of my knowledge, there has been nothing done by your organization or the firemen to make any steps forward in this area.

Then you come back here with political pressure and say to Senators, whoever the Senator or the Congressperson may be, "We want you to support this; it is politically important to us."

Now, I have worked very closely with the police and the firemen. I had the head of the FOP do a TV spot for me when I was running politically. I have had a close working relationship with the police and firemen. And it hurts me to fight you as strongly as I am prepared to fight you, but I think that this is so fundamentally wrong, I could not live with myself, and I do not know how some of you can live with yourselves in throwing that man out of work—because he is 62 years of age; throwing other people out of work because they are 55 years of age; throwing this man, who has given his whole life to police work, out of work.

How the hell can you live with yourself and justify it? There is nothing wrong with him. The fact is he looks to me like he is in great shape.

Certainly, Leon Monroe is in great shape. I remember when I would leave here late at night, and he would be standing there,

and I would think, "This guy is really built strongly." He is built like Strom Thurmond, as a matter of fact.

So I just do not understand how you can sleep with yourself when you are throwing all of these people out of work for no reason other than the fact that they did the terrible thing of living to the age of 55.

Your floor.

Mr. CABRAL. No response.

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. I have no questions, Mr. Chairman. I just want to commend you for what you are doing and the statement you just made.

Senator METZENBAUM. Thank you very much.

It is interesting to me that two of the best Senators in the United States are two of the oldest members of the U.S. Senate. This country would be far worse off if we had thrown this man out at 55, and I am immodest enough to say I think we would be worse off if they had thrown me out at 55. And I am sure they would be worse off if they had thrown the man on my right out at the age of 55; he is 57, is that right?

Mr. OWENS. Yes,.

Senator METZENBAUM. Please, Congressman Owens, if you have a statement, please proceed.

Mr. OWENS. Yes, just briefly, Senator. Thank you very much for inviting me to sit in on this hearing. My Subcommittee on Select Education and Civil Rights, obtained jurisdiction over this matter just a year ago, so I was not here when the deal was made, whatever the deal was. I am also not ever influenced to any great degree in a matter as serious as this by political muscle of anybody.

I think it is important to note, and one of the things I said to the Senator was that we had no record of any employee organizations—I did not say there was no opposition, Senator; I said there were no employee organizations who felt that this was an injustice to exempt the law enforcement, fire fighters, and related professions from this requirement. I heard from no organizations of employees as a group.

Now, individuals, you have here this morning, and I am sure there are individuals who take exception to it, but I still know of no organization of employees who have run counter to the general prevailing opinion and scientifically endorsed opinion that these jobs have a special quality. It is not that the physical requirements are greater for a fireman or a policeman than for a worker who is working on a steel girder high up in the air; it is the extra, added component of stress. They must work fast, they must work under conditions that are unpredictable. In the case of policemen, they must make split-second decisions which impact on the lives of everyone around them, including themselves, and this made it different.

Now, I think there has been some dereliction of duty, and perhaps the Senator is right in terms of the fire fighters, the police, law enforcement, and related professions taking steps to deal with this problem in a more definitive way during the 7-year grace pe-

riod, but also, the Federal Government had a duty, and it did not prosecute that duty very well.

The study that was commissioned was a very inadequate study in many ways, and they also came back to a conclusion that one must take into consideration. Their conclusion said "we have evidence that using physical abilities testing is an alternative to chronological age in making retirement decisions," that it is possible to do that. They caution, however, that "the effectiveness of physical abilities testing has not been substantially tested in cohorts of older public safety employees," and that all of their conclusions are based upon studies of people who were less than 50 years old—less than 50 years old. So there are no studies of people older in these situations. There are no measurements of individual to individual to be able to determine who is fit and who is not fit.

I think it is a rational proposition that we should try to get to the point where there are scientifically validated measurements and wait until we get to that point to deal with this kind of critical situation.

The example, also, of the Federal Government sticks out in that they had exempted all law enforcement personnel and all fire fighting personnel who are Federal employees. I think you cannot ignore those kinds of factors in making this kind of decision, that we had a reasonable reason to go ahead and presume that this is a special case, and whereas I am against age discrimination or discrimination of any form, you had some overwhelming considerations here that merited leaving the situation open, at least for a while.

One of the members of my subcommittee called for additional studies, and we did authorize \$5 million for additional studies, and I think it is an area where there should be additional studies in order to guarantee that there is every fairness for individuals. There are individual differences, and there are people who are far older than I am who can perform these duties far better than I could, far better than any experienced professional fire fighter at age 57. There are people 60 and 70, who can probably do it better. But they are individuals, and in order to guarantee the safety and welfare of the public, I think you need something better than just the accident of individuals being exceptions. You need some way to be able to establish, some way to measure what you are getting. I think it is a reasonable proposition, firmly backed up by science, and that is the reason we proceeded as we did.

But I welcome this opportunity to hear some opposing opinions from people who have been employees or who are employees at this point.

Senator METZENBAUM. Thank you very much, Congressman.

I might say that there is a letter here from the Massachusetts State Police Association which does oppose the exemption. And I should also point out to you that Dr. Frank Landy, our next witness, will be speaking about the study, and can address himself to that subject. But we also have on the next panel the AARP, which has taken a very strong position indicating their opposition to this exemption.

I want to thank the members of the panel for participating with us this morning. We look forward to continuing to work with you, and I appreciate your being here.

Thank you especially, Mr. Monroe.

Mr. MONROE. Thank you, Senator.

Senator METZENBAUM. Our next panel consists of Dr. Francis Landy, director of the Center for Applied Behavioral Sciences at Pennsylvania State University, University Park, PA; Frederick H. Nesbitt, director of Governmental Affairs at the International Association of Fire Fighters, Washington, DC; and Captain Frank Well, Los Angeles County Fire Department, Los Alamitos, CA, representing the AARP.

Dr. Landy, please proceed. We are happy to welcome you this morning.

STATEMENTS OF FRANK J. LANDY, DIRECTOR, CENTER FOR APPLIED BEHAVIORAL SCIENCES, PENNSYLVANIA STATE UNIVERSITY, UNIVERSITY PARK, PA; FREDERICK H. NESBITT, DIRECTOR OF GOVERNMENTAL AFFAIRS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, WASHINGTON, DC; AND FRANK A. WALL, JR., CAPTAIN, LOS ANGELES COUNTY FIRE DEPARTMENT, LOS ALAMITOS, CA, REPRESENTING THE AMERICAN ASSOCIATION OF RETIRED PERSONS.

Mr. LANDY. I am pleased to have the opportunity to speak with you today. I directed the study mandated by Congress to examine the feasibility of substituting tests for chronological age and making retirement decisions regarding public safety officers.

I led a Penn State University research team that included internationally-known scientific experts in areas such as work performance, gerontology, occupational medicine, exercise physiology, epidemiology, statistics, law enforcement and fire administration, and public policy. In addition, most of the members of our research team have been conducting research on the physical demands of law enforcement and fire fighting for several decades. Thus, our team was scientifically and practically familiar with the demands of the jobs in question.

Our work spanned 22 months. Over 500 of the largest cities, counties and States completed extensive questionnaires about the demands of public safety jobs in their agencies, the injury and death rates in their departments, and their retirement policies.

We also analyzed data sets related to illness, injury and fitness of public safety officers from various Federal, State, county and municipal agencies. We used that information to complete an exhaustive job description of both the tasks carried out by public safety officers as well as the knowledges, abilities, and skills necessary to carry out those tasks successfully.

Our final report runs to several thousand pages and in fact, this is the final report sitting on the table here; it consists of data analyses, literature reviews, and court cases. There are six volumes.

Senator METZENBAUM. And that was done at the request of—

Mr. LANDY. This was a study done requested by EEOC.

Senator METZENBAUM. By EEOC.

Mr. LANDY. That is correct, and that is the study that sits on the table.

Our final report runs to several thousand pages and carefully considers the results of over 5,000 research studies. It is the largest and most comprehensive scientific study of these issues ever to have been conducted and has been given high marks for breadth and accuracy by knowledgeable scientists and researchers both in the U.S. and abroad.

In our study, we considered two primary issues related to performance—incapacitation due to illness and ability decline. The most important question we were to answer was whether tests could substitute for age in making retirement decisions.

Before answering those questions, let me clarify the issue of age and performance as we considered it. We are considering the role of age by itself. An individual's physical condition and subsequent job performance can be affected by many variables, including lifestyle, nutrition, exercise, and commonly experienced illness.

Many older workers maintain a healthy lifestyle and nutrition, follow a program of exercise, and take preventive actions to avoid illness, and as a result are successful in their work long after younger colleagues begin to decline.

Neither the effective work of the older employee nor the ineffective work of the younger employee is the result of age per se. Instead, the work effectiveness reflects nonage-related variables.

Our study focused on the effect of age per se on performance and separated that effect from the effect of lifestyle, illness or injury.

Now to our conclusions and recommendations. First, it is our conclusion that age is a poor predictor of who will experience a debilitating illness at the work site, particularly if the individual in question has no prior history of illness or current symptoms. There are many accurate procedures available for identifying underlying illness that have the advantage of increased precision without the discriminating effect of labelling all people of a particular age as somehow "prone" to one or another illness.

Similarly, we believe that age is a poor predictor of current ability. By ability, I mean things like stamina, strength, reasoning and comprehension. The age-related decline of job-related abilities is slight. In addition, there are substantial variations within any age group in terms of ability. There are 30-year-olds who cannot climb a stairway pulling a charged fire hose, and there are 60-year-olds who can. Further, it is clear that experience makes a substantial contribution to effective work performance. Younger public safety officers invariably turn to their older colleagues to take the lead in difficult and dangerous actions, and those older colleagues invariably oblige.

Finally, we came to the conclusion that tests are a safe and effective alternative to age in making retirement decisions. The best example to support that conclusion is provided by police and fire departments themselves. These departments are currently using tests for hiring that could just as easily be used for making retirement decisions, and in our report, we identify and describe available and, in our opinion, legally defensible tests for the important job-related abilities required of public safety officers. By using such tests, a police or fire department will also be in compliance with the Civil Rights Act of 1991 and the Americans with Disabilities Act.

These conclusions, then, led to our recommendation. We recommended that the exemption to ADEA be eliminated and that public safety officers be protected from age discrimination like all other American workers.

Since that exemption expired on December 31, 1993, the current policy is in line with our recommendation. It is our belief not only that public safety is not jeopardized by the elimination of that exemption, but also that the increase in the experience base and the protection of the rights of additional workers actually adds to the public good.

The scientific basis for this conclusion is presented in our report; again, I refer to it here on the table. From the scientific perspective, the proposed legislation, H.R. 2722, would be a step backward.

I would be pleased to answer any questions you might have about our research, conclusions, or recommendations, and their implications.

Thank you.

[The prepared statement of Mr. Landy follows:]

PREPARED STATEMENT OF FRANK J. LANDY

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Our final report runs to several thousand pages and carefully considers the results of over 5,000 research studies. It is the largest and most comprehensive scientific study of these issues ever to have been conducted and has been given high marks for breadth and accuracy by knowledgeable scientists and researchers both in the United States and abroad.

The ultimate question that we had to answer was as follows: Can we tell simply by knowing someone's age that they will perform well or poorly in their job? The 1986 ADEA amendment has already settled that issue for almost all American workers. The only issue that remained was to answer that question specifically for public safety officers.

In our study, we considered two primary issues related to performance—incapacitation due to illness and ability decline. The most important question we were to answer was whether tests could substitute for age in making retirement decisions.

Before answering those questions, let me clarify the issue of age and performance as we considered it. We are considering the role of age by itself. An individual's physical condition, and subsequent job performance, can be affected by many variables including lifestyle, nutrition, exercise, and commonly experienced illness. Many older workers maintain a healthy life style and nutrition, follow a program of exercise, and take preventive actions to avoid illness, and, as a result, are successful in their work long after younger colleagues begin to decline. Neither the effective work of the older employee or the ineffective work of the younger employee is the result of age per se. Instead, the work effectiveness reflects non-age related variables. Our study focused on the effect of age per se on performance and separated that effect from the effect of lifestyle, illness, or injury.

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I would be pleased to answer any questions you might have about our research, conclusions, or recommendations and their implications.

Senator METZENBAUM. Thank you very much for a very clear and unequivocal statement.

I am sorry that the chairman of the EEOC is not with us. He should be here. The report was prepared for the EEOC, and that commission has a responsibility. He advised me yesterday that his statement had not been cleared by the administration. I have spoken with the administration. The administration has a responsibility to belly up to the bar and take a position on this subject, and this Senator expects to press them to do so. I think there can be only one rightful conclusion.

Mr. Landy, would you like to respond to the criticism Mr. Nesbitt made of you and the Pennsylvania study?

Mr. LANDY. Yes, I would, Senator.

In the written testimony that Mr. Nesbitt has submitted for today, I would like to respond to not all of the details, but just the most mean-spirited criticisms and outrageous claims in that statement. I would like to do it in the presence of Mr. Nesbitt and also of the members of the committee.

Mr. Nesbitt asserts that the House Subcommittee on Select Education and Civil Rights did an analysis of the Penn State study. The analysis to which he refers was actually submitted by IAFF and rebutted by written response from the scientists who worked on the team. Dr. Nesbitt fails to mention that the rebuttal exists, and it is only alluded to in the record of the House subcommittee, but I will forward it at the conclusion of this hearing for inclusion in this record.

Mr. Nesbitt asserts that a careful reading of the Penn State study shows that age is closely correlated with physical ability. On

the contrary. What we say throughout the study, and as I just repeated in my prepared testimony, is that when life style, nutrition and illness are stripped away from age, age accounts for little of the difference in work performance. Further, the differences within any age group are larger than the differences between any age group.

This includes ages groups over 60. In yesterday's Boston marathon, several hundred runners were over the age of 60. How many of us in this hearing room under the age of 60 ran in that marathon yesterday?

Mr. Nesbitt states that while only one-seventh of all fire fighters are over the age of 50, they account for over one-third of the fire fighter deaths. From that, we are presumably to conclude that substantial numbers of fire fighters are at greater risk because of diminished physical capacities.

It is instructive to do the math here. The National Fire Protection Association carefully tracks fire fighter deaths. In 1990, a total of 36 fire fighter died of heart attacks. Fourteen of those 37 had prior reported heart problems—that is, heart attacks or bypass surgery. Every one of these problems could have been identified by testing, though not by age, since they had not yet been forced to retire. Of those 37 deaths, 16 occurred at fires. We know that fewer than 2 percent of the active fire fighters are over the age of 60. This means that of those 37 deaths in 1990, only two or three at the most occurred to fire fighters over the age of 60 while fighting fires.

The NFPA report agrees that even these deaths could have been prevented through testing or screening. It is interesting to note that the IAFF is suggesting that public policy be formed on the basis of these two or three deaths, deaths that could have been prevented if our recommendation of testing had been followed.

It is hard to fathom why IAFF resists the testing of individuals, particularly when it would result in the saving of fire fighters' lives.

Mr. Nesbitt asserts that fitness tests cannot be used because they will unfairly discriminate against protected subgroups and uses gender norming as his example of how fire departments got around discrimination in the past. He claims that norming has been widely used in fire departments to ensure more women qualify for positions.

In addition to insulting female fire fighters in the United States, he is dreadfully mistaken about the practice of norming. Over 95 percent of the fire departments in the country do not use special rules for hiring women. Our report clearly documents that percentage. Further, over 97 percent of the fire departments in the country use fitness tests for hiring right now.

Our report also clearly documents that percentage. This means that virtually every department in the country is using a physical fitness test, and not using any special scoring for women. This is vast different from Mr. Nesbitt's claim.

Further, as EEOC can confirm, the number of lawsuits related to entry-level physical tests is greatly diminishing. Using physical fitness tests for hiring is easier now than before, not more difficult.

The most distasteful criticism in Mr. Nesbitt's testimony is his personal attack on my honesty and objectivity. He puffs up my accomplishments and activities in a way that would astonish both my accountant and my colleagues. He asserts that I make my living designing fitness tests for police and fire departments. In fact, less than one percent of my income, and about that percentage of my time, is associated with fitness tests. If this is my life's work, I think I need a new life.

With respect to the charge that I was biased, I have the ultimate defense, as do all scientists. I published the results of my work and the methods by which those results were achieved for peer review. An independent panel of scientists reviewed the methods and conclusions and came to a very different conclusion from Dr. Nesbitt. They concluded the study was carefully and fairly carried out, and its conclusions well-supported.

In contrast, at the very first meeting that was held with the IAFF, the representative attending that meeting, Richard Duffey, began the meeting by stating that any conclusion that did not support 20 years and out with a full pension would be rejected by the IAFF. He offered the opinion that if it were up to him, he would prefer a much younger retirement age.

Mr. Nesbitt claims that a test I developed for the State of Massachusetts caused kidney failure in 12 recruits and that two almost died. The test in question was a simple stairway climb. After 2,000 candidates had taken the test without incident, a lawyer lodged the complaint that two cousins—one 21 and the other 27—had experienced kidney failure after taking the test. These two cousins were examined by a kidney specialist at the Bay State Medical Center. His report confirmed that there was no evidence of kidney failure in either of the plaintiffs.

Nevertheless, the State of Massachusetts commissioned a medical panel to review the test in question. The panel included the chairman of the orthopedics department of the University of Massachusetts Medical Center, the chief of the renal kidney department at Shattuck Hospital, and the director of the Boston Dialysis Center. After reviewing the relevant medical reports of the plaintiffs, that commission concluded that there was no evidence of kidney failure in any plaintiff and that the test was safe and effective and that the administration should resume.

The State of Massachusetts began again entry-level testing on April 6, without any further incident.

This commission further concluded that fitness tests and training should be developed and implemented on a statewide basis, and as far as I have been able to determine, this commission did not make their living from fitness testing, nor did they consider it their life's work.

Incidentally, the National Fire Protection Association, the association that promulgates standards of equipment and performance for professional fire fighters and monitors deaths and injuries among fire fighters also suggests fitness training and screening, and as far as I have been able to determine, they do not make their living doing fitness testing, nor do they consider it to be their life's work.

I will submit a full copy of the Massachusetts Commission report with my testimony.

In his testimony, Dr. Nesbitt claims that I attributed near-fatal injuries to over-training. I did nothing of the sort. The Massachusetts report clearly documents that there were no near-fatal injuries. My only comment had been that over-training, like any over-exertion, can lead to muscle pulls and tears—hardly an earth-shaking conclusion for most of us.

I could go on for considerably longer, but I will not. Suffice it to say that the IAFF criticisms are gratuitous, ill-founded, and personally insulting. I will submit a considerably more detailed written rebuttal for the record.

Senator METZENBAUM. Dr. Landy, I have a chart in my hand that shows medical and fitness tests for hiring are well-established. In the fire department, when asked does the department require physical performance tests for hiring, the answer is 97 percent yes for firemen and 88 percent yes for policemen.

Then, they ask does the department require job applicants to have medical exams, and the response is 97 percent for firemen and 99 percent for policemen. Also when asked does the department require continuing employees to have medical examinations, the answer is only 54 percent for firemen and only 37 percent for police, a rather embarrassing figure, to say the least.

According to responses to the EEOC study's request for information from police and fire departments, these are the results that you were able to find. Is it possible and practical to use these same hiring tests for retirement purposes?

Mr. LANDY. Yes, it is, Senator, and I think I can make this most clear with a very simple example. Let us assume that there was absolutely no maximum age for hiring, as the case in Reno, and suppose that a 57-year-old or a 62-year-old presented himself or herself for testing, that is, for a job of fire fighter or police officer. That person would be given exactly the same tests as a 22-year-old, or a 27-year-old or a 31-year-old. And further, it is a trivial distinction as to whether that test is being used to make a hiring decision or a retirement decision, because what we are testing are the job-related abilities necessary to do the job.

So the answer to your question is absolutely, that exactly the same tests that are currently being used for hiring could be used for making retirement decisions, and we know they exist in 97 percent of the departments.

Senator METZENBAUM. Do you know what percentage of police and fire departments have fitness programs?

Mr. LANDY. It varies, but it ranges about 35 percent. There are slightly more in police departments than in fire departments, but it hovers between 30 and 35 percent.

Senator METZENBAUM. Congressman, any questions of Dr. Landy?

Mr. OWENS. Yes. There is one question you did not address, or I did not hear you address, Mr. Landy, and that is the question of, in your very comprehensive study of studies, you did not have any specific group of individuals that you studied, but you studied other studies, right? You made a report on what had been studied already.

Mr. LANDY. No, Representative Owens. Our study included both the studies that other people had done as well as data that we had gathered ourselves, from 67 major cities around the United States, as well as data that we had collected from the National Fire Protection Association and from places like Los Angeles County.

So we actually did our own analyses of data sets, and we gathered data from over 67 cities.

Mr. OWENS. Now, is this statement incorrect or correct, which says that, "effectiveness of abilities testing has not been substantially studied in cohorts of older public safety employees," and that your conclusions are based upon studies of public safety employees who were all less than 50 years of age?

Mr. LANDY. That is not correct, Representative Owens. What it says is "extensive testing of cohorts." As you know, because there are mandatory retirement regulations in most cities, and we know that virtually all fire fighters retire, whether there is a mandatory program or not, before the age of 60, there are just not many folks around to test after they get to be 61 or 62.

But we did present data—as a matter of fact, one pretty dramatic chart—that showed the effect of training on fire fighter over the age of 60, and what it showed was that after physical ability training, the 60-year-old fire fighter was in better condition than the 44-year-old fire fighter. That is included in our report.

Mr. OWENS. But that is only a tiny sampling.

Mr. LANDY. It was everyone who was available.

Mr. OWENS. There have been no studies because, as you say, for various reasons, and one of those reasons is that they are not available for study.

Mr. LANDY. There have been studies—not extensive studies.

Mr. OWENS. When you say "extensive," what do you mean?

Mr. LANDY. Not as many as fire fighters ages 40 to 50, or 30 to 40. There were four data sets that we were able to get our hands on that allowed us to directly compare older fire fighters with younger fire fighters.

Mr. OWENS. Four data sets compared to—what kind of data sets did you have for those below 50?

Mr. LANDY. Probably, in terms of extant data, about 35 data sets.

Mr. OWENS. Thank you.

Senator METZENBAUM. Senator Thurmond, any questions of Dr. Landy?

Senator THURMOND. I do not think I have any questions especially. I think it is a very serious thing when we try to deny by law the right of people to work because of age. Some people are not able to work maybe at age 40 or 50, for one reason or another.

I am 91. I can do more work than any staff member on my staff. Why? Well, I guess I inherited some good genes, but I think the main thing is that I take exercise. Every morning before I eat breakfast, I exercise for 50 minutes—20 minutes of calisthenics, pushups, pullups, twisting, bending, stretching; lying on a bench, lifting weights, 10 minutes; and riding the stationary bicycle 20 minutes. In addition, I swim a half-mile two or three times a week.

So it depends on the individual. In my opinion, just to say that because a person reaches a certain age, you cut him off, is ridicu-

lous. That is denying him a freedom, I think, that we have in this country.

So I hope that we will not take a stand here that will deny older people the same opportunity as younger people if they are qualified to work.

Are you in accord with that?

Mr. LANDY. I think we could have been in compliance with the reduction in paperwork order if we had just asked you for your opinion, instead of producing the many thousands of pages in our report. [Laughter.]

Senator METZENBAUM. Thank you very much.

Senator METZENBAUM. Mr. Nesbitt, for a contrary point of view, is director of governmental affairs for the International Association of Fire Fighters.

Mr. NESBITT. Mr. Chairman, my name is Frederick Nesbitt, and I appear today in behalf of the Nation's 200,000 professional fire fighters to offer our views on this issue.

The Nation's fire fighters support giving State and local governments the option to utilize age-based employment criteria in structuring their work forces. Our union has opposed and continues to oppose all forms of employment discrimination, but there are rare instances in which age is a valid criterion, and public safety work is one of those rare exceptions.

We believe that public safety is an exception to the general rule, based on numerous scientific studies which show that the ability of a person to perform the work of a fire fighter or a police officer or a correction officer declines with age.

Advancing age is directly correlated to declining strength, reduced aerobic capacity, and increased risk of sudden incapacitation. Our own data, data collected by the International Association of Fire Fighters over a number of years, show that older fire fighters are more likely to be killed or seriously injured in the line of duty than younger fire fighters.

We agree with Major Owens that age does indeed affect an individual's ability to perform the duties of a public safety officer, and this is not a stereotype, and it is not an ageism; it is a medical fact.

Public safety is an exception to the general rule because the intended beneficiaries of the law—the workers themselves—are demanding that public safety occupations be exempt from the ADEA. Resolutions supporting this exemption have been unanimously approved at several of our conventions, most recently, our convention in 1992, and we have received literally thousands of letters and phone calls from fire fighters across the Nation expressing their support of this exemption, and I have put some of these quotes in the testimony for you—and these are not from union leaders, but from rank-and-file members.

As long as there have been fire departments and police departments in this Nation, as we can recall, there have been age requirements, both in terms of hiring and in terms of retirement. So a mandatory retirement age is not something new to fire departments and police departments. We have had it almost for ever, and it works, and people are satisfied with it.

I salute our opponents on this issue, who were able to locate one of our very few members who opposes this legislation to speak be-

fore the committee today. But please make no mistake about it—Frank Wall's views do not reflect the opinion of other public safety officers. Indeed, he does not even represent the views of other fire fighters in his local. I have letters from the leadership of his local expressing their strong support for a public safety exemption from ADEA. In his department, they have a mandatory retirement age of 60.

Every major organization representing rank-and-file fire fighters, police officers, correction officers, and employers has endorsed the public safety exemption from the ADEA. Even the AFL-CIO Executive Council, at its winter meeting this past February in Bal Harbor, called for exempting public safety occupations from this law. I have a list that I would like to have inserted in the record, Mr. Chairman, if you will, of organizations who support the public safety exemption.

Senator METZENBAUM. It will be included without objection.
[The document referred to follows:]

ORGANIZATIONS SUPPORTING H.R. 2722, the Age Discrimination in Employment Amendments of 1993

AFL-CIO,
American Federation of State, County and Municipal Employees,
Fire Department Safety Officers Association,
Fraternal Order of Police,
Government Finance Officers Association,
Human Relations Committee, IAFF,
International Association of Chiefs of Police,
International Association of Fire Fighters,
International Brotherhood of Police Officers,
International Personnel Management Association,
International Union of Police Associations,
International Society of Fire Service Instructors,
National Association of Counties,
National Association of Police Organizations,
National Conference of State Legislatures,
National League of Cities,
National Public Employer Labor Relations Association,
National Sheriffs Association,
National Troopers Coalition, and
U.S. Conference of Mayors.

Mr. NESBITT. The basic issue is that human lives are at stake. There is no other profession in which the inability to perform one's duties is so certain to result in injury or death of innocent people. And this price is too high to take chances. State and local governments must be given the flexibility to ensure a physically fit, fully qualified and balanced work force. This is happening at a time when we are experiencing staffing reductions.

Five or 10 years ago, they sent an engine with five or six fire fighters; today, they are closing fire stations, and they are sending that same engine, but they are sending it with four fire fighters or three or two to do the work that was once done by five or six.

Those who oppose the use of mandatory retirement age in public safety occupations point to the fitness test as a better way to ensure a qualified work force. Fitness tests are presently not valid alternatives to age. Fitness tests have a long history of being struck down by the courts because they are discriminatory.

Just last month, the U.S. District Court for the District of New Hampshire ruled that a hose pull test given to fire fighter appli-

cants is invalid because it discriminates against women. After hearing the evidence that the test requires upper body strength not present in the average woman, the court enjoined the city from using the test and ordered the city to hire a female applicant who had failed the test. This certainly sounds like a valid fire fighter test, a hose pull. However, we know that women do not have the same upper body strength as men; therefore, it is inherently discriminatory.

Fitness tests are not a valid alternative to age because they are dangerous. We have included in testimony the situation in Boston, what happened with the entry-level exams in that situation.

Fitness tests do not measure real world experiences of our membership. They do not measure extreme temperature fluctuations, smoke, stress, or fatigue. Many States have already passed presumptive heart and cancer and lung laws, because they know that a fire fighter who has been on the job for 25 years has been taking 25 years of smoke into his lungs. From day one when a fire fighter goes to his first fire, he is exposed to cancerous materials that he breathes into his body and into his lungs for 25 years.

In the absence of valid—and the key word is “valid”—performance tests, there is currently no better predictor of ability than age.

Mr. Chairman, we are not opposed to the concept of testing. Our proposed public safety officer amendment which we support expressly includes language which will continue the search for valid performance tests. And under our proposal, the Equal Employment Opportunity Commission is required to study the extent to which performance tests can accurately measure the ability necessary to be a public safety officer, taking into account such issues as Federal antidiscrimination laws.

The current reality is that valid performance tests that can replace mandatory retirement ages have not yet been identified. In the absence of such valid performance tests, States and local governments must be given the option to utilize age as an employment criterion.

Mr. Chairman, organizations representing rank-and-file public safety officers were divided on the question when Congress debated this issue back in 1986, and I am sure you are well aware of that. But in 1993 and 1994, they are unanimous in their support of this proposal. And it does not mandate retirement at age 55. It says that a State or local government has the option to establish, if they believe it is necessary, entry-level and mandatory retirement ages. And under this proposal if it were to become law, the State of Indiana, for example, which currently has a mandatory retirement age of 70 for fire fighters, would be able to continue that mandatory retirement age of 70, and New York City would be able to continue their mandatory retirement age of fire fighters at age 65, and those cities that do not have a mandatory retirement age, and do not want to have a mandatory retirement age, would be able to continue to do that. We leave it up to the local government as a local option to determine whether they believe they need a mandatory retirement age to ensure a balanced work force in terms of young fire fighters; in our case, middle-aged, more experience fire fighters, and then more senior and more experienced fire fighters, so that you would have a mix in this particular situation.

And if I may for a second take exception to your earlier comment in your opening remarks, we do not believe we have reneged on the deal. We do not think there was a deal made 7 years ago that—

Senator METZENBAUM. Do you mean to say there was not a deal made with me?

Mr. NESBITT. I do not believe there was a deal made that was a phase-in.

Senator METZENBAUM. A phase-in, my eye. I know what a deal is. I know what an understanding is. Do not tell me, sir, that there was not a deal made. It was made to give you a 7-year exemption on the basis that in that period of time, you would work out tests. There was a deal made, and I say to you do not challenge my integrity in this committee. I am telling you there was a deal made, and you are in no position to say it was not made. You were not there.

Mr. NESBITT. I was not there, but in conversations with people from my union who were there and involved, it is their opinion also that there was not a deal made to have a phase-in. It was to be a 7-year temporary exemption, and at the end of 7 years, after the EEO study was done, the Congress would then revisit the issue to see if there were fitness tests or better alternatives to age to determine the job performance of a fire fighter, a police officer, or a corrections officer.

Senator METZENBAUM. I can only say to you, Mr. Nesbitt, that that is an unmitigated lie. I was there. I made the deal. I know what occurred. I provided the exemption for you, for your group, the police, as well as some professors up in the Massachusetts are.

You were not there, and I say to you, a deal was made. I know what an understanding and a deal is.

Now let us proceed on to the next witness.

Mr. NESBITT. Senator, if I may, I was not there, but I did read the legislative history, and I do not believe it was a phase-in.

Senator METZENBAUM. As a matter of fact, I am just told that another member of the U.S. Senate, Senator Wendell Ford, agrees with me that there was a deal. I do not know exactly the source of that statement, but I gather that somehow my staff learned that he agrees that there was a deal.

Let me ask you one question, because I thought you made a very gratuitous remark about the next witness, that I sort of felt was inappropriate, and is not normally done around here. You took a whack at him, saying he did not speak for the group that he is speaking for; he is speaking for the AARP.

Are you a fire fighter, Mr. Nesbitt?

Mr. NESBITT. No, I am not a fire fighter.

[The prepared statement of Mr. Nesbitt follows:]

PREPARED STATEMENT OF FREDERICK H. NESBITT

Mr. Chairman, my name is Frederick Nesbitt and I am the Director of Governmental Affairs for the International Association of Fire Fighters. I appear before you today on behalf of the nation's 200,000 professional fire fighters to offer our views on the issue of mandatory retirement and maximum entry ages for public safety officers.

Seven years ago, Congress enacted the Age Discrimination in Employment Act Amendments of 1986. The law exempted public safety occupations from the ADEA for a period of seven years while a study was conducted to determine whether such an exemption was warranted. Based on the results of that study, the House of Rep-

representatives voted unanimously last year to retain the ADEA public safety exemption.

The nation's fire fighters appear before you today to ask that you move expeditiously to enact the Public Safety Officers Amendment to the ADEA which would allow local police and fire departments to utilize age-based employment criteria in structuring their workforce.

THE UNIQUE NATURE OF PUBLIC SAFETY OCCUPATIONS

Let me state from the outset that the International Association of Fire Fighters opposes all forms of employment discrimination and we fully support the Age Discrimination in Employment Act. It must be noted, however, that the ADEA was never intended to ban all uses of age in employment. There are rare instances in which age is a valid and irreplaceable criteria. Public safety work is one of those rare exceptions.

The first reason we believe that public safety is an exception to the general rule is based on numerous scientific studies that show the ability of a person to perform the work of a fire fighter or police officer declines with age. A close reading of the so-called Penn State study shows that advancing age is directly correlated to such vital factors as declining strength, reduced aerobic and an aerobic capacity, and increased risk of sudden incapacitation [see attached analysis of the Penn State Study conducted by the House Subcommittee on Select Education and Civil Rights]. Our own data show that older fire fighters are much more likely to be killed or seriously injured in the line of duty than younger ones. For example, while only one-seventh of all fire fighters are over age 50, they account for more than one third of all fire fighter deaths.

In the words of Representative Major Owens of New York, a well known fighter against all forms of employment discrimination, "Age does indeed affect an individual's ability to perform the duties of a public safety officer. This is not a stereotype. This is not ageism. This is a medical fact."

A second reason that public safety is an exception to the general rule is that the intended beneficiaries of the law—the workers themselves—are demanding that public safety occupations be exempt from the ADEA.

Indeed, I know of no issue which has broader or more passionate support among our membership. Resolutions supporting the exemption have been unanimously approved at several of our conventions—most recently at our last convention in 1992. And we have received literally thousands of letters and phone calls from fire fighters across the nation expressing their support for this exemption. Allow me to share with you just a few excerpts from letters sent by our rank and file members to their Senators on this issue.

"When I went on the job two weeks before the maximum entry age of 36, I never thought I'd be supporting an act like this, but at age 58 I feel that it is really necessary to have both a maximum entry age and a mandatory retirement age."

Thomas Ginacchi, Fairfield, CT

"As a professional fire fighter who could theoretically be discriminated against if exempt from the ADEA, I have no reservations in supporting the exemption."

Murray Orlov, Columbus, OH

"In Chicago, we had a mandatory retirement age of 63. To work past age 63 in such a physical and demanding job is unsafe for those firefighters and the citizens they are supposed to protect."

Herbert Schmidt, Chicago, IL

"As a 53 year old fire fighter, I know that my physical capabilities have diminished considerably. The physical demands of our job at a fire scene with life at risk are as great as any professional athlete. The difference is that that if we are unable to perform our duties, human life may be lost, not the game."

Ken Van Dyke, Grand Rapids, MI

"I have never written you before, but I had to this time because I feel this is an important issue not only for myself, but also for the safety of all the public."

Alex Korvath, Brook Park, OH

"The City of Philadelphia, like many other municipalities throughout the nation, is facing tough financial times. Philadelphia has decided to remediate that difference on the shoulders of its fire fighters. There are fewer fire companies and less personnel on each apparatus. To remove the maximum entry levels and mandatory retirement age would further jeopardize firefighter safety, as well as the lives of those whom we serve."

James Kerrigan, Philadelphia, PA

"I assure you when I retired at age 52 I was no longer able to fight fire or perform a heavy rescue. A 50,60, or 70 year old person has no place in public safety."

Buck Swartz, Alexandria, VA

"Wisconsin has a current retirement age limit of 55 for protective employees and I think this should continue."

Brian Berthiaume, Chippewa Falls, WI

"Firefighters and police officers must work as a team. We depend on the other members of our crew to have the strength and savvy to save our life if the need arises. If we are unable to do our job, people die."

Carl Below, Eugene, OR

"I am asking you to support this amendment because I know that even at my relatively young age of 41, the best years of my physical capabilities are already behind me. I cannot believe that any one using a common sense approach would believe that 70 or 80 year old fire fighters would be a good thing for their communities well being."

Robert Johnson, Harwich Port, MA

"To allow entry level positions to be open to all, regardless of age, could also have a devastating effect on our goal, to protect the public we serve from natural and man-made disasters that we face in everyday life."

Frank Nefos, Birdsboro, PA

"Fire fighting is at best, a very strenuous activity. We go from a semi-state of calm to full exertion within a matter of moments. The ability to do this effectively is a matter of life or death."

Robert Lee Bragg, Charlottesville, VA

"After 26 years as a firefighter and supervisor I can attest [that] the abuse that one's body takes from smoke, stress, physical exertion, injuries and pain (both physical and mental) takes its toll. As an old Firehouse saying goes, 'It's a young man's job.' If a firefighter is unable to do his job, there is not a delay in the work being done, but maybe death."

Daniel Finegan, Chester, NY

Mr. Chairman, we are a very large organization, and obviously there can never be completely unanimous support for any position. Any organization of 200,000 individuals is going to have a few people who disagree with the sentiments of the overwhelming majority. In this regard, I salute our opponents on this issue who were able to locate one of our very few members who opposes this legislation to speak before the Committee today. But please make no mistake. Frank Wall's views do not reflect the opinion of public safety officers. Indeed, he does not even represent the views of other fire fighters in his local. I have letters from the leadership of Mr. Wall's union local expressing their strong support for the public safety exemption from the ADEA.

There are far more members of the American Association of Retired Persons who support our proposal than members of our organization who oppose it. If you would find it helpful, I would be happy to provide you with letters from AARP members who strongly support this legislation.

Significantly, fire fighters are not alone within the public safety community in support of this proposal. Every organization representing rank and file fire fighters, police officers and corrections officers has endorsed the public safety exemption from the ADEA. Even the AFL-CIO, the nation's foremost voice for working people and long time champion of employment discrimination legislation, has called for exempting public safety occupations from this law.

In short, there is not a single organization that speaks for the men and women in America's public safety occupations that opposes this exemption. We believe this fact alone warrants serious consideration of the proposal.

But the most important reason that public safety occupations are an exception to the general rule against age-based employment criteria is simply that human lives are at stake. There is no other profession in which the inability to perform one's duties is so certain to result in the injury or death of innocent people. This price is too high to take chances. States and local governments must be given the flexibility to ensure a physically fit, fully qualified and balanced workforce.

Mr. Chairman, I am well aware that we disagree on this issue, but I think it is telling that your own legislation repealing mandatory retirement ages for federal public safety jobs leaves intact the age limits used in the military. As we have often stated, the best analogy for the work of fire fighters is the work of the nation's armed services. We are the nation's domestic defenders, and our ability to carry out our mission is every bit as vital to the lives of Americans as is the ability of the military to perform its duties.

If the omission of the military in your legislation to repeal federal mandatory retirement ages is an indication that you believe there is something intrinsically different about the nature of the military, we would invite you to spend some time with one of your local fire departments to see first hand how the fire service oper-

ates. Once you've seen our brave men and women in action I'm sure you'll agree that if age limits are valid in the military, they are valid in the fire service as well.

FITNESS TESTS

Those who oppose the use of mandatory retirement ages in public safety occupations point to fitness tests as a better way to ensure a qualified workforce. Unfortunately, fitness tests are presently not a valid alternative to age. Allow me to explain a few problems we currently have with fitness tests and how we hope to address these shortcomings.

First, fitness tests have a long history of being struck down by courts because they are discriminatory. Just last month, the U.S. District Court for the District of New Hampshire ruled that a hose-pull test given to fire fighter applicants is invalid because it discriminates against women. After hearing evidence that the test requires upper body strength not present in the average woman, the Court enjoined the city from using the test and ordered the city to hire a female applicant who had failed the test.

Mr. Chairman, I find it especially significant that the specific test that was rejected by the court as discriminatory in this case is a hose-pull test. This test is clearly job-related. Pulling a hose is something every fire fighter must do. Nevertheless, the court threw out the test based solely on the fact that males find it easier to pass the test than females.

The ability of fitness tests to withstand legal challenges has become increasingly difficult due to the enactment of two recent civil rights laws. The first, the Civil Rights Act of 1991, bans the use of test "norming." Norming has been widely used in the fire service as a way to ensure more women qualify for positions, and the inability to norm scores will make it much more difficult to design a test which is both meaningful and doesn't discriminate based on gender.

The second civil rights statute that will affect fitness testing is the Americans with Disabilities Act. The ADA contains broad new limitations on the use of fitness testing which make it far more difficult to defend their use in court.

The advent of these two laws, in conjunction with Title VII of the Civil Rights Act of 1964, will make it extraordinarily difficult and perhaps impossible for local governments to design meaningful physical fitness tests which can ensure a qualified workforce. To date, EEOC has been unable to identify valid tests that will meet these criteria.

A second reason fitness tests are not a valid alternative to age is that they can be dangerous. Recently, twelve fire fighter recruits in Boston were hospitalized with renal failure after undergoing a fitness test designed by Dr. Frank Landy, the principal author the Penn State study and staunch advocate of fitness testing. Two of the applicants nearly died. In defending the use of the test, Dr. Landy claimed that the near-fatal injuries could be attributed to overtraining by the job applicants.

Mr. Chairman, if these tests can kill people who overtrain for them, then we are going to have a very serious problem on our hands if tests become required of incumbents as well as applicants. If a fire fighter knows that he or she must pass the test to keep their job, you can be assured that they are going to strenuously train for it.

A third reason we believe fitness tests to be invalid is based on the real world experience of our membership. Tests conducted in a doctor's office or in a gymnasium simply do not replicate the physical demands placed on fire fighters at a fire ground operation. We are aware of no fitness tests that can account for such factors as extreme temperature fluctuations, smoke, stress, fatigue and the speed at which a person must go from a sedentary state to a state of full exertion. A fitness test can measure a person's ability to climb three flights of stairs carrying a hose. But it can not measure a person's ability to perform that task in a smoke filled building in sub-zero temperatures only minutes after being awakened from a deep sleep.

For all of these reasons, we believe that performance tests are not valid predictors of an individual's ability to perform the job of a fire fighter. In the absence of valid performance tests, there currently is no better predictor of ability than age.

Mr. Chairman, allow me to stress that we are not opposed to the concept of testing. Indeed we are hopeful valid tests can be developed in the future. That's why our proposed Public Safety Officers Amendment to the ADEA expressly includes language which will continue the search for valid performance tests. Under our proposal, the Equal Employment Opportunity Commission is required to study the extent to which performance tests can accurately measure the abilities necessary to be a public safety officer, taking into account such issues as federal anti-discrimination laws.

If EEOC is able to identify valid performance tests under the criteria set forth in the House-passed legislation, we will fully support revisiting the issue at that time. As Rep. Owens stated on the House floor, "In making this exemption from the ADEA permanent, our intent is not to forever close the door on this issue. Rather, our objective is to ensure that when Congress does reexamine this issue, it does so because there are compelling reasons to take another look—not because of some arbitrary, predetermined deadline."

Nevertheless, the current reality is that valid performance tests that can replace mandatory retirement ages have not yet been identified: In the absence of such valid performance tests, states and local governments must be given the option to utilize age as an employment criteria.

Before leaving the issue of physical fitness testing, I would like for one moment to address the Penn State's study recommendations regarding these tests. We are of course aware that Dr. Landy concluded in his study that fitness tests are reliable predictors of ability, and I want to share with you why we believe these findings should be taken with a large grain of salt.

From the very beginning of Dr. Landy's study, it was clear to us that he had predetermined that fitness tests were better predictors of ability than age, and all of his research was geared toward supporting that conclusion. Dr. Landy selected studies which supported his conclusions, ignored those that refuted it, and flagrantly violated the provisions of the law which required him to consult with affected organizations. Even with these extraordinary efforts to skew the results of his study, it is dubious at best that his research supports his conclusions.

Although we realized early on that Dr. Landy had made up his mind before the study began, we never before understood the reason for his bias. We now do.

When not conducting studies, Dr. Landy makes his living designing physical fitness tests for police and fire departments. Putting aside for a moment the potential conflict of interest, it is hardly surprising that Dr. Landy considers his life's work to be legitimate. It's a natural human emotion.

If you wanted to know if buying a used car is a good idea, the last person you would ask for an unbiased opinion is a used car salesman. In the same light, Dr. Landy's bias must be taken into account when reading the conclusions of his work.

CONCLUSION

Mr. Chairman, over the past seven years the Public Safety Officers exemption to the ADEA has proven its value. Organizations representing rank and file public safety officers were divided on the question when Congress last debated it, but are now unanimous in their support. The House of Representatives, which narrowly approved the exemption in 1986 after heated debate, adopted H.R. 2722 unanimously. Not a single dissenting voice was heard during deliberations in subcommittee, full committee or on the House floor.

Unfortunately, the 1986 exemption expired on December 31, and public safety agencies are now in a state of limbo. In light of the vast support for this proposal, we ask you to move as quickly as possible to give final approval to the Public Safety Officers Amendment to the ADEA.

Thank you. I would be happy to answer any questions you may have.

SUMMARY

alternatives to chronological age in determining suitability for public safety jobs

(1992 study by Penn State's Center for Applied Sciences)

Introduction

The ADEA Amendments of 1986 directed the EEOC to study whether age is a scientifically valid criterion for the mandatory retirement of public safety personnel and to determine whether physical ability tests could be used instead of chronological age in making retirement decisions for public safety personnel. The EEOC commissioned the Center for Applied Sciences at Pennsylvania State University to perform this study.

The authors of the study have recommended that the current exemption of public safety personnel from ADEA be allowed to expire. Many who have reviewed the full text of the study, however, believe that it does not adequately support this recommendation. In commissioning the study, the EEOC had assumed that there was an abundance of empirical data available upon which the authors could base their conclusions. This proved not to be the case. The authors found that "the data necessary for a completely confident recommendation was non-existent" and in lieu of the needed data, they relied heavily on the "collective expertise of team members"

to make their recommendations (p. 9). Other problems with the study include its use of small, non-random and unrepresentative survey sampling and some value judgments made by the authors with which many members of the Committee may not agree.

For this reason, it is important to review the study carefully, paying attention to not just its conclusions, but also how the authors reached these conclusions and the extent to which they are supported by empirical data. The study also identifies a number of troubling policy implications of eliminating the public safety exemption which must be considered.

This memo summarizes the central findings of the Penn State study and includes page references to the text of the study. The extensive length of the study precludes us from making copies available to every office. Staff, however, are welcome to review the full text in the Subcommittee office.

OVERVIEW

Current Public Safety Retirement Policies

About half of the public safety agencies surveyed had written retirement policies. Fifty-five percent of these had an age-specific mandatory retirement policy, with most of these agencies mandating retirement between 60 and 65 years of age. Most employees at agencies with age-specific mandatory retirement age retire before reaching this age.

"Accumulated deficit": Effects of Aging on Abilities

—With advancing age there is an increasing likelihood that decline will occur in at least some abilities. Since there are large individual differences in the amount and rate of change, the authors believe that it is unlikely that there is an age at which 95 percent of all individuals (the ADEA standard for age to be a "bona fide occupational qualification") would not be able to perform the functions of a public safety officer.

—However, the authors caution that they were unable to reach a "definitive" conclusion as to whether 95 percent of public safety employees at a certain age could meet minimum ability and fitness standards.

Efficacy of Physical Abilities Testing as an Alternative to Chronological Age

—Abilities testing is likely to be as effective as age for predicting performance of physically arduous tasks, but this question has only been studied among cohorts of public safety employees who were less than 50 years old.

Implications of Using Abilities Testing in Lieu of Chronological Age

—The use of abilities testing instead of chronological age in making retirement decisions would impose higher costs on law enforcement agencies, increase litigation over retirement decisions, and may have an adverse impact on women and minorities.

—There is little available data to assist agencies in establishing standards and minimum "cut scores" for abilities tests.

Effects of Aging on the Risk of Sudden Incapacitation

—The risk of sudden incapacitation due to a cardiovascular event clearly increases with age.

—A mandatory retirement age, used in conjunction with screening for other risk factors, is the most effective way of reducing the risk of sudden incapacitation.

—Without age-based or other screening, the authors estimate that in any given year there will be 8.75 events for every 100,000 employees in which sudden incapacitation by public safety personnel will have an adverse effect on the public safety. They express the opinion that this threat is not sufficiently significant to justify the use of age-based screening.

CURRENT PUBLIC SAFETY RETIREMENT AND HIRING POLICIES

Retirement and Hiring Policies

About half of the fire and police departments surveyed had formal written retirement policies. Fifty-five percent of these departments had an age-specific mandatory retirement policy, with most of these requiring retirement between the ages of 60 and 65 (1-31).

A minority of departments (26 percent of fire and 32 percent of police) have set maximum ages at which they will hire personnel. The median maximum hiring age for these departments is age 35 (2-50).

Impact of Current Policies

The study points out that at departments with age-specific mandatory retirement policies, "few individuals stay in primary public safety positions up to retirement age, regardless of that age" (1-28). The authors also cite evidence that there are nu-

merous employment opportunities available for retired public safety personnel who wish to continue working full- or part-time.

"ACCUMULATED DEFICIT" AND RISK OF SUDDEN INCAPACITATION

The study examined two issues which relate to the extent to which chronological age affects an individual's fitness to perform the duties of a public safety officer: (1) "accumulated deficit", or the deterioration of abilities to the point where an individual can no longer safely and effectively perform public safety duties; and (2) the risk of sudden incapacitation, such as by heart attack, during the performance of public safety duties.

"Accumulated deficit": Effects of Aging on Abilities

GENERAL CONCLUSIONS

Generally, the authors found that "aging is related to performance in a probabilistic fashion, that is, with advancing age there is increasing likelihood that decline will occur in at least some abilities" (4-4). They emphasize, however, that there are large individual differences in the amount and rate of change in abilities due to aging. For this reason, they express the opinion that there is unlikely to be a chronological age at which 95 percent of all individuals (the ADEA standard for age to be a "bona fide occupational qualification") would not be able to perform the functions of a public safety officer (18).

The authors caution that this opinion is not based upon a "definitive test" of this issue. They note that there is no consensus about what the minimum competency standard for public safety officers should be and the study did not address what this standard should be. Until such a standard is determined, it is not possible to predict whether 95 percent of public safety officers at a certain chronological age will be able to meet it. They also suggest that the available data concerning the health and ability status of public safety personnel may not be sufficient to support any definitive conclusion (4-45).

Specific Effects of Aging on Abilities

Surveying the medical literature, the authors summarize what is known about the effects of aging on abilities:

Cognitive Abilities: "Overall, the evidence suggests that the amount of cognitive decline occurring as part of the normal aging process is relatively small and should not interfere with everyday functioning." (4-15).

Aerobic and Anaerobic Capacity: Aerobic and anaerobic capacity, which governs an individual's ability to effectively sustain strenuous physical tasks, declines substantially with age (4-19). For example, one measure of aerobic capacity, an individual's maximal volume of oxygen consumed per unit time (V_{O2} max), declines at a rate of 1 percent per year. Maximal cardiac output is reduced by 30 percent to 40 percent between the ages 20 and 70 years. The rate of decline in aerobic and anaerobic capacity varies among individuals and is influenced by genetics, physical activity, weight, and other factors.

Strength: There is a substantial decline in strength with age (4-64). One study of male firefighters found that upper body strength declined at a rate of 8.5 percent per decade among men over 40; lower body isometric strength decreased by between 9.7 percent to 13.5 percent per decade after age 40. This age-related decline in strength may be "attenuated" but not reversed by participation in strength training programs.

Flexibility: "Age-related declines in flexibility—are quite modest and are well within the range of commonly selected functional limits" (4-70).

Motor Behavior: "Age-related performance declines have been identified for a wide variety of motor behaviors", but the research evidence is inadequate to "make accurate predictions regarding the degree of motor performance decline which can be expected to accompany any particular chronological age" (4-82).

Health and Fitness Status of Public Safety Employees

The authors also review published studies on the health and fitness status of public safety employees. These studies indicate that there is "a marked decline in the health status of public safety employees with advancing age" (4-44) and that their health profile is similar to that of a "sedentary" population (4-40). For example, one study of male firefighters found that pulmonary impairment was manifested in 8 percent of those ages 20 to 29 years and 35 percent of those ages 50 to 59 years. In another study of male firefighters, hypertension was found among 70 percent of those ages 50 to 65 years; pulmonary impairment was found in 53 percent of those ages 60 to 65 years (4-43).

Efficacy of Physical Abilities Testing as an Alternative to Chronological Age

The authors evaluated the effectiveness of using physical abilities testing as an alternative to chronological age in making retirement decisions. They found that "abilities testing has been shown to be at least as effective as age for predicting performance of physically arduous tasks" (4-38). They caution, however, that the "effectiveness of physical abilities testing has not been substantively studied in cohorts of older public safety employees" and that their conclusion is based upon studies of public safety employees who were less than 50 years of age.

Implications of Using Abilities Testing in Lieu of Chronological Age

The authors identify a number of important implications of using abilities testing instead of chronological age in making retirement decisions. These include:

Higher Costs for Law Enforcement Agencies: "The costs for a test-based program would be substantial. These costs would include not only the administrative costs associated with the testing but also the costs associated with a defense of the testing program and standards in the context of litigation. It is likely that legal challenges to retirement decisions will increase if tests replace age as the criterion" (7-14).

Adverse Impact on Women and Minorities: "It is conceivable that a testing program that includes both mental and physical elements may introduce adverse impact on protected groups. Data suggest that ethnic minority incumbents will do more poorly than majority incumbents on cognitive tests. Similarly, data suggest that females will fare more poorly than males on physical ability tests. Thus, there is the possibility that many of the gains realized by minority and female incumbents in terms of entering the public safety workforce may be erased or even reversed by a continuing testing program directed toward competency measurement" (7-15).

Difficulty in Setting Test Standards and Cut Scores: There is little data available to assist municipalities in setting, validating and defending test standards and "cut scores". If a "cut score" can be shown to have an adverse impact on older workers, the municipality must be able to demonstrate that the score is job-related and that there is no other reasonable alternative. There is little available research upon which to base such decisions. "Indeed, to date there exists just one published study: [aerobic fitness of firefighters] in which a cut score on a physical ability was derived from empirical data on the physiological demands of public safety tasks in conjunction with age associated changes manifested by the employees" (4-54).

Uncertainty about Additional Implications: "Implementing testing for determining employment status could become a complex and controversial process, and there are no prospective data or case studies pertaining to its full impact on hiring, promotion, disability, and pension" (4-53).

RISK OF SUDDEN INCAPACITATION

The authors also examined the extent to which age is related to the risk of an individual becoming suddenly incapacitated due to a cardiovascular event (e.g., heart attack).

Effects of Aging on the Risk of Sudden Incapacitation

Among asymptomatic individuals (i.e., without a history or symptoms of cardiovascular problems), the risk of sudden incapacitation due to a cardiovascular event clearly increases with age. For example, the risk of developing coronary heart disease over the next years is 1 percent for a man aged 35 and 11.1 percent for a man aged 60 (6-58, 6-62). The annual risk of sudden incapacitation increases nearly six-fold between the ages of 40 and 60 (8-10).

Screening to Reduce the Risk of Sudden Incapacitation

The study concludes "there is no practical way of identifying all asymptomatic individuals who will develop sudden incapacitation". The authors acknowledge that an age-specific mandatory retirement age will reduce the risk of sudden incapacitation, but find that "approaches combining age and other risk factors with or without exercise testing were superior to strategies relying on the use of age itself" (6-58).

Implications for Public Safety

Although the authors conclude that age-based mandatory retirement will reduce the risk of sudden incapacitation, particularly when used in conjunction with screening for other risk factors, they maintain that such screening is unnecessary because the likelihood that sudden incapacitation will affect public safety is "vanishingly small" (17). This conclusion is based on several assumptions made by the authors:

1. Only about 23 percent of the incidents of sudden incapacitation will occur while the individual is at work (the average person spends about 23 percent of his or her time at work).

2. Since public safety personnel only spend an estimated 30 to 75 minutes per week performing "critical" public safety tasks, only 9.3 percent of the incidents of sudden incapacitation will occur while the individual is performing a task which di-

rectly affects public safety (this assumption is based on a survey and task analysis performed by the authors).

3. The incident of sudden incapacitation will only impair performance of the public safety task 50 percent of the time (this assumption is based on data from the Framingham heart study that found that 50 percent of persons developing sudden incapacitation had warning symptoms at least 30 minutes prior to the attack).

4. When the incident of sudden incapacitation does impair performance, it will only materially influence the outcome of the event 50 percent of the time due to intervention by other personnel on the scene and other factors (the authors do not cite any data to support this assumption).

On the basis of these assumptions, the authors estimate that without an age-based mandatory retirement age or screening for other risk factors, for every 100,000 personnel in any given year there will be 8.75 events in which death or injury is caused by the sudden incapacitation of a public safety officer (6-55). In other words, since there are 1.5 million public safety employees in the United States, without age-based screening there will be an estimated 135 events every year in which death or injury to another is caused by the sudden incapacitation of a public safety officer.

The authors acknowledge that age-based screening would reduce the number of these events but express the view that this would not be worthwhile.

Senator METZENBAUM. The next gentleman is a fire fighter. Let us hear from him.

Senator METZENBAUM. Captain Frank Wall, of the Los Angeles County Fire Department, Los Alamitos, CA, representing the American Association of Retired Persons.

You are a fire fighter, sir?

Mr. WALL. Yes, sir.

Senator METZENBAUM. Would you please make your statement?

Mr. WALL. Mr. Chairman, my name is Frank Wall. I am a captain with the Los Angeles County Fire Department, and I am here to discuss my job and represent AARP.

I will be 60 on my next birthday. If this bill, H.R. 2722, passes, I will be thrown off my job. It is a job that I love and at which I excel.

Currently, I am in charge of the fire suppression camp in the Santa Monica Mountains near Malibu. I supervise fire crews on wild land fires in rugged terrain, and on other disasters, such as earthquakes, floods, air rescue operations, and mountain rescues. I coordinate all daily activities at our camp, all out-of-camp construction projects at other fire facilities, and am responsible for the ongoing training of our fire crews and rookie crew members, plus all the paperwork.

My job requires leadership, experience, and calm in the face of danger, as well as physical strength. Keeping fit is an absolute necessity in our department. Periodic medical exams have been required for all of our fire fighter since the early 1970's.

We also have a mandatory physical fitness program, which consists of one and a half hours of rigorous cardiovascular exercise every day you are on duty. I make sure my crew of 24 works out and passes the tests. I do not know how much it costs to give the tests, but whatever it is, it is worth it, both in terms of public safety and probably financially also.

We have fewer injuries and disabled people. The fire fighters in my department today are in much better shape than when I joined the force.

I have never failed a fitness test, and I have taken one every year for the last 9 years. Due to my age, I am required to take one once a year. Like many of my colleagues, I have developed a per-

sonal fitness program that keeps me in top shape. I run or hike a minimum of 12 miles a week, work out in the weight room, and do strength exercises for my legs and upper body. And I can come nowhere near bench pressing 300 pounds, like Captain Devereaux can. I have logged over 10,000 miles of running since 1971. I have completed two marathons, many half-marathons and 10K runs.

Like a lot of the guys I work with, I did not do any of this before the fitness tests were instituted.

Last fall, I worked 19 straight days fighting the enormous Greenmeadow and Malibu fires. My assignments required every single bit of training and experience I have. One night, my strike team, which included 42 State inmates, was assigned to save the Foundation for the Junior Blind. I sized up the situation, devised a plan for my 45 people, and we went to work setting a back-fire. This was tough work that had to be done quickly.

We cut through dense brush and set fires between the Junior Blind structure and the main fire. These back-fires consumed the fuel that otherwise fed the main fire. I coordinated all the work of the three crews, had to continuously adjust to changing wind conditions—the winds were gusting to 60 miles an hour—watch for spot fires and immediately jump on them, and make sure everything was done quickly. My knowledge and experience were especially important, because the inmates are strong but are not trained as fire fighters.

We saved the Junior Blind Foundation.

After the Los Angeles earthquake in January, I worked 12 straight days with my strike team, cleaning up and demolishing damaged structures, laying temporary water mains, and providing relief services directly to the public. Fire fighting does not work if you do not trust your crew leader. There are a lot of strong people in the world who would make bad fire fighters.

Although I keep up with my crew in every task, what they rely upon is my experience and my judgment. The outstanding job they do on all emergencies proves that they trust me and that I am doing a good job for the people of Los Angeles County.

I am not unique. Last summer, I worked on a fire in Griffith Park within the City of Los Angeles. The fire was burning in steep, rugged terrain, heading for the park's observatory. A Los Angeles City engine company crew, led by Captain John Peterson, was laying hose lines to support our crews with water. They did an outstanding and difficult job. Captain Peterson is 68. Neither I nor my crew would hesitate to work with him again. The LA City Fire Department is a Class I, nationally known fire department, with no mandatory retirement age, and has a physical fitness program and tests.

I am a member of the International Association of Fire Fighters. They do a lot of good work, but they are wrong on this one, and many of my fellow fire fighters agree with me.

Mr. Chairman, I have to express surprise at some of the things Mr. Nesbitt has said. First, I have already said I am not here to represent my local union or my department. But I know lots of fire fighters, young and old, agree with me; I have spoken with them. The local union, of course, has to support the international, even though lots of people do disagree. In fact, a senior representative

of the international in Northern California had his union position rescinded for voicing his disagreement with the international.

Second, many organizations representing public safety employees oppose this bill. The Police Executive Research Forum, the New Jersey State Association of Chiefs of Police, and the Massachusetts Police Association, with 17,000 members, are among them. Civil rights groups oppose it, too.

Third, the international is dead wrong about what AARP's members think. AARP's Legislative Council, which is made up of AARP members, has voted every single year to oppose this type of mandatory retirement.

AARP has received lots of letters from rank-and-file police officers, fire fighters, and correctional officers, objecting to mandatory retirement. Hundreds of them have even gone to court to keep their jobs.

Of course, some AARP members disagree, just like there are IAFF members who disagree.

Fourth, the international says that it is not possible to devise good fitness tests. That is just not true. We do it, LA City does it, and lots of other departments do it. I cannot understand why any department would not want to.

Our testing program has encouraged our fire fighters to stay in shape, eat better, and stop smoking and drinking. The measure of a fire fighter is not his or her age; it is whether he or she can do the job.

Mr. Chairman, I am out on the line every day. I know what it takes to do the job. I have been in the job of protecting the public my entire life. If I ever felt that I was not up to it, I would quit, or I would be told to quit.

My pension is equal to my salary, so if I retired, I would have the same money coming in as I do now. But I know this is not the time for me to leave, and my colleagues agree. I hope you will agree.

Thank you.

[The prepared statement of Mr. Wall follows:]

PREPARED STATEMENT OF FRANKLIN A. WALL, JR.

Mr. Chairman, I am Frank Wall, a Captain with the Los Angeles county Fire Department. I'm not wearing my uniform because I'm here to discuss my job and represent AARP, not my department or County.

I will be sixty on my next birthday. If this bill, H.R. 2722, asses, I will be thrown off my-job. It's a job that I love and at which I excel.

For most of my life I've been involved with firefighting. My father was an Engineer with the City of Los Angeles Fire Department for 33 years. He voluntarily retired at age 65, still fit and healthy. I've wanted to be a firefighter since I was seven years old. I was a Marine, and then did a plumbing apprenticeship. But, in 1960, I took a 50 percent cut in pay to join the County of Los Angeles Fire Dept. I've worked in almost every firefighting operation—Fire Suppression Operations, Fire Prevention Bureau, Service Bureau and as a Recruit Training Captain. I've worked most of my time in the most active firestations in Los Angeles, mainly South Central LA. I've worked with firefighters of all ages and abilities in our department and others.

Currently, I'm in charge of a Fire Suppression Camp in the Santa Monica Mountains near Malibu. I supervise fire crews on wildland fires in rugged terrain, which requires extreme physical exertion. I also supervise crews on other disasters such as earthquakes, floods, air rescue operations, and mountain rescues. I coordinate all daily activities, all of the out-of-camp construction at other fire facilities, and am responsible for the ongoing training of our fire crews and rookie crew members, plus

all the paper work. The job requires physical strength and stamina—in the 1988 Yellowstone Firestorms we worked 12-hour shifts for a month with the U.S. Marine Corps. Equally important, it requires leadership, experience, and calm in the face of danger.

Keeping fit is an absolute necessity in our fire department. Periodical medical exams have been required for all firefighters—of all ages and in all jobs—since the early 1970's. We also have a mandatory physical fitness program, which consists of 1½ hours of rigorous cardiovascular exercise every day you are on duty. It's my responsibility to make sure my crew of 24 works out and passes the tests. I don't know how much it costs to give the tests, but whatever it is, it's worth it both in terms of public safety and probably financially also. We have fewer injuries and disabled people. There's no question that the firefighters in my department today are in much better shape than when I joined the force.

I've never failed a fitness test, and for the past nine years I've taken one every year. Like many of my colleagues, I have developed a personal fitness program that keeps me in top shape so that I know I'll pass the test. I run or hike a minimum of 12 miles a week, work out in the weight room and do strength exercises for legs and upper body. I've logged over 10,000 miles of running since 1971, completed two marathons and many half marathons and 10K runs. I didn't do any of this before the fitness requirement was instituted.

Last fall, I worked nineteen days straight fighting the enormous Greenmeadow and Malibu fires. You probably saw these on the TV news. My assignments required every single bit of training and experience I have accumulated in my 34-plus years on the job. One night, my strike team—which was expanded to include 42 state inmates—was assigned to a crew working to save the Foundation for the Junior Blind camp and retreat. I sized up the situation, devised a plan and explained it to my 45 people, and went to work setting a back-fire. This was tough work that had to be done quickly. We cut through dense brush and started "firing out," which was basically setting fires between the Junior Blind structure and the main fire to consume fuel that would otherwise feed the main fire. As supervisor, I coordinated all the work of the three crews, had to continuously adjust the work plan to changing wind conditions—the winds were gusting to 60 mph—watch for spot fires and immediately jump on them, and make sure everything was done quickly. We saved the Junior Blind Foundation.

After the Los Angeles earthquake in January, I worked twelve days straight with my strike team cleaning up and demolishing damaged structures, laying water lines and providing relief services directly to the public.

Firefighting doesn't work if you don't trust your team leader, or the person next to you. Although I keep up with them in every task, my crew really looks to me for my experience and judgement. The outstanding job they do on all emergencies proves that they trust me and that I'm doing a good job for the people of Los Angeles County.

I am not unique in either experience, age, or fitness. Last summer I worked on a mutual aid fire in the Griffith Park area, within the City of Los Angeles. The fire was burning in steep, rugged terrain heading for the Park's observatory. A Los Angeles City engine company crew, lead by Captain John Peterson, was laying hose lines to support our crews with water. They did an outstanding job under very demanding and complicated physical conditions. Captain Peterson is 68. Neither I nor my team would hesitate to work with him again. LA City Fire Department is a Class I, nationally known fire department with no mandatory age requirement and a physical fitness program.

I have been a member of the International Assn. of Firefighters since I joined the Department. I praise them for their efforts to make the fire service safer and better for firefighters, and for working to get us good benefits and job conditions. But they are wrong on this one and many of my fellow firefighters agree with me.

IAFF says that it's not possible to devise good fitness tests. That's just not true. We do it, LA City does it, and lots of other departments do it. I can't understand why any department wouldn't do it. Our fitness testing and fitness programs have encouraged our firefighters to stay in shape, eat better and stop smoking and drinking. I'd rather work with any one of the people in my department or LA City than someone from a department that doesn't test like we do.

This bill, H.R. 2722, is blatant discrimination. The measure of a firefighter is not his or her age, its whether he or she can do the job.

Mr. Chairman, I'm not a politician. I'm out on the line everyday. I know what it takes to do the job. I've been in the job of protecting the public my entire life. If I ever felt that I wasn't up to it, I'd quit. Certainly, my team would tell me to quit, because their lives are in my hands. I've seen firefighters who have been asked to leave because they couldn't do the job or pass the fitness test.

I'm not working for the money. My pension is almost equal to my salary, so if I retired I'd have the same money coming in every day as I do now. But I know this isn't the time for me to leave, and my department and my colleagues know it too. I hope you will agree and vote against this bill.

OPPOSE

H.R. 2722 (age discrimination in employment amendments of 1993)

This bill denies coverage of an important civil rights law—the Age Discrimination in Employment Act—to police officers and firefighters who put their lives on the line for us. It allows state and local governments to forcibly retire—and refuse to hire—police officers and firefighters solely because of their age, and regardless of an individual's competency, skill and experience. This is overt age discrimination. In 1986, Congress made clear that public employers must cease this practice beginning in 1994.

H.R. 2722 is opposed by the Leadership Conference on Civil Rights, the Leadership Council of Aging Organizations, the Equal Employment Opportunity Commission and other groups concerned about fair employment opportunities for all American workers.

The discrimination sanctioned by this bill fails to accomplish any of its goals:

- It will not insure public safety.
- It will not increase the number of jobs available to younger persons who wish to be police officers or firefighters.
- It is costly and inefficient.

1. Maximum hiring and retirement ages do not insure public safety. The ability of a fire department or police force to do its job well depends upon the abilities of all members of the department, regardless of age. This can only be assured by periodically testing all members of the department for fitness and competency, as is done for all new recruits.

Two independent studies—one commissioned by Congress (done by Pennsylvania State University) and one done by the FBI Academy/Major City Chiefs of Police Association—have concluded that age is a poor predictor of public safety and fitness: periodic testing of all officers and firefighters, as well as new recruits, is the only way to accomplish this goal. Of course, such tests must be fair, non-discriminatory, neutral and job-related.

The U.S. Supreme Court has repeatedly held, and countless scientific studies have agreed, "age is not a substitute for safety-related job qualifications. Mandatory retirement does nothing to protect the public from unfit younger workers, e.g., an overweight 40 year old firefighter. Maximum hiring ages, some of which deny jobs to people as young as 26, obviously bear no relationship to physical or mental fitness or public safety.

2. Maximum hiring and retirement ages do not increase the number of jobs available to younger persons who wish to be police officers or firefighters. The supporters of H.R. 2722 have argued that mandatory retirement is needed to get older workers out so as to open up jobs in the top ranks and increase opportunities for younger employees and new recruits. History has shown this to be absolutely false. Most police officers and firefighters already voluntarily retire well before mandatory retirement age.

State and local governments usually have special retirement plans for public safety employees that provide generous pensions after 20-25 years of service, regardless of age. Since the pension plans generally give little credit for any additional service, the overwhelming majority of police officers and firefighters choose to leave when 100 percent vested—well before any mandatory retirement age. So few officers remain that mandatory retirement has virtually no effect on the make-up of police and fire departments, the upward mobility of younger workers or the number of openings available to new recruits.

Maximum hiring ages do nothing more than deny jobs to relatively young persons, sometimes as young as 26, some of whom may be uniquely qualified for the job. For example, a retired military police officer could be as young as 38, which would preclude a second career as a state or local police officer in many jurisdictions.

3. Mandatory retirement is expensive for the employer. Although the supporters of these bills argue that cash-strapped state and local governments must be able to retire high-paid older workers in order to hire lower paid younger workers, this is both unrealized and a false economy.

—As noted above, most older police and firefighters voluntarily retire well before the maximum age (usually between ages 40-45), thereby eliminating the payroll expense.

—Mandatory retirement forces persons who are making contributions into the plan into becoming beneficiaries, who take money out of the plan. Many of these pension plans are underfunded and require substantial contributions from employees. (This same rationale has caused Congress to gradually increase the age (from 65 to 67) at which Social Security will pay out full benefits in the future.)

—Because most officers retire in their early-to-mid 40's, mandatory retirement has little or no effect on disability or workmen's compensation premiums or payouts. In contrast, jurisdictions that utilize periodic physical and mental fitness tests for all employees have found that, because they are screening out unfit police and firefighters (and providing them with an incentive to stay fit), their workmen's compensation and disability costs have gone down. They have also found that such testing is quite inexpensive.

Senator METZENBAUM. Thank you very much for a very strong statement from an obviously experienced fire fighter, one who has been on the line, and I think understands the requirements of what it takes to be a fire fighter.

I would like to come back to the subject of whether or not there was an understanding and a deal. That deal was negotiated between me, Senator John Heinz, Wendell Ford, and Austin Murphy, and there can be no question about it.

You were not there, sir, and you are hardly in a position to testify based upon what somebody told you.

I also at this time would like to say that Senator Jeffords wanted to be here to echo his opposition to H.R. 2722, but had a previous commitment to see his doctor.

I also want to put into the record a statement from Tony Gallegos, who was the chairman of the Equal Employment Opportunity Commission, which goes to the question of the validity and strength of the report that was made, and mentions the fact that "the selection of academic researchers for the contract also prevented predetermined conclusions. The criticism that there was a predetermined point of view in the research relies on the premise that there would have been a scheme to produce biased results among a group of at least 20 major researchers, many of whom worked independently during the study. These academic researchers maintain their reputations by conducting accurate research. Participation in a biased study, besides, raising ethical concerns would be detrimental to their standing in their communities."

"A final measure that guarded against bias was the coordination of the study methodology. Prior to establishing the final research plan, Dr. Landy and his associates met with representatives from police and fire fighter organizations. In that meeting, Dr. Landy provided a detailed explanation of the approach to be taken in the research. No objections were raised to Dr. Landy's methodology."

"Given these structural controls on the research, it is difficult to imagine how biases could have surfaced in the study."

Signed, Tony Gallegos, Chairman.

That letter in its entirety will be included in the record.

[The information referred to appears at the end of the hearing record.]

Senator METZENBAUM. Mr. Nesbitt, the fire fighters knew for 7 years that this exemption was due to expire on December 31, 1993. What did the fire fighters do during that 7-year period to consider alternatives to mandatory retirement?

Mr. NESBITT. We have done a number of things. First of all, our health and safety department does considerable research, and we

collect data on our own fire fighters, in terms of death, in terms of injuries; we track heart disease and lung cancer. So we have a considerable data base, which we did offer to Penn State, and they declined to use it because it ran contrary to what Dr. Landy was looking at, and that is, it shows that as the age of a fire fighter increases, first of all, the number of injuries on the fire ground also increases.

Now, I think you would probably say to yourself, well, gee, that does not sound logical, because you would think that a young, inexperienced fire fighter would be more likely to hurt himself or herself than a more experienced fire fighter. But in our data, it shows just the opposite.

It also shows that as age increases, the number of heart attacks on the fire ground increases substantially, and death increases substantially.

So, one, we have collected data. Two, you referred to the agreement that was made in 1986. We thought part of that agreement was—and you wrote it into the law—that we were to be an active participant in the study. I believe—I cannot quote it directly, Senator—but I think it mandates that organizations representing fire fighters and police officers would play a role, or be substantial participants, in the study.

The extent of our participation in the Penn State study was about a 2-hour meeting at the beginning of the study and a 2-hour meeting at the end of the study, when we were told the results of the study. So we did not have an opportunity to actively participate in the study.

Third, we have developed, and been working within our international with all of our locals. We strongly support physical fitness programs. We do not think that if a department, for example, has a mandatory retirement age—for example, the State of Indiana has a mandatory retirement age for fire fighters at age 70—we do not believe that we should just have a mandatory retirement age of 70 and do nothing else. We supported, worked, and developed physical training programs for individuals.

Senator, we have moved away from the area of testing because we believe that there are no valid tests, and we believe that tests are inherently discriminatory and are going to knock out women in the fire service and minorities.

What we are supporting and we advocate is a wellness program, and that is a program that when you come on the job as a fire fighter, as brand new recruit, we work with you in terms of teaching you how to keep your body in the best shape possible during your tenure as a fire fighter; what kind of physical training you should have, what kind of exercise you should do, what you should eat—firehouse food has historically been high in fat and calories, and we are going now with light food in the firehouse—discouraging our members from smoking and drinking; having mandatory physical exercise on the job; an appropriate medical examination each year to test for stress levels, to check out their heart, and so on and so forth.

This is what we have been doing.

Senator METZENBAUM. OK.

Mr. NESBITT. But let me finish one thing, if I may. While we have been doing this, you know very well what has been happening in State and local governments. The money has been cut back.

In Baltimore, they used to give a mandatory physical examination for fire fighters for heart and stress every year. They canceled it. Why? It costs too much money.

In Phoenix, AZ, which is one of the best fire departments, a prime example. In every fire station, we have a wellness program going. They have a universal gym. For an hour and a half while you are on the job, you are required to go to the universal gym and work out and do the program that has been developed for you. How many fire departments are going to put a gymnasium in their fire department and give people an hour and a half time to work on the job to do this, and have an appropriate doctor and an appropriate counselor to do this?

But our union is doing this, and we are working. So that for the 7 years, we did not sit back and do nothing, and we did not sit back and say, well, in 7 years, we will come back to the Congress and to our friends and try to get something else.

We thought something important would come out of the Penn State study. But we know that the tests that they are talking about in the Penn State study are not valid tests. And the key word is "valid." I mean valid in terms of do they really test job performance. A hose pull sounds like it would be a job performance test, because that is what our people really do. But the court said no, because it is a measure of upper body strength and women do not have as much upper body strength as men, so it is inherently discriminatory.

If you have a hose pull test, no one has determined how heavy the hose should be, how far you should have to pull it, and in what time period for it to be a valid measurement of performance.

And what would stop a city, for example, Senator, from saying that, well, this year, we think we will make the hose this weight, this distance, and this time, because we do not want anyone to flunk the test, or next year, they will say, gee, we have a lot of senior fire fighters, and it would be nice to retire some of them because they are pulling down some big money, and we can certainly bring in some new fire fighters, who would make a lot less money—and I know you have heard that from State and local governments, that that is one of the cost-cutting mechanisms—so we will increase the weight of the hose by 50 pounds, we will increase the distance by 25 feet, and we will reduce the time by 15, 20 seconds, and make sure at least 15, 20 percent of the senior officers fail the test, and then we will move them out and hire young fire fighters at much less pay, and therefore, we will balance the city budget.

That is what we are concerned about, and that is why we say it is in the absence of valid tests. That is the problem. We do not have those valid tests in 1994.

Senator METZENBAUM. Mr. Nesbitt, I have let you go on for about 5 to 10 minutes. Now will you be good enough to answer my question. You did not answer it at all. You told me about all of—

Mr. NESBITT. Senator, I certainly did. We have collected data—

Senator METZENBAUM. Just a moment, just a moment, Mr. Nesbitt. This time, I am talking. I asked you what did you do to

consider alternatives to mandatory retirement. You responded and told me about the monetary problems some places are having, you told me about all the different kinds of programs and fitness tests, you criticized Dr. Landy's work—but you have not answered my question, and it is very simple. What did you do to consider alternatives to mandatory retirement? It is not a question of what you did about training people, keeping them physically fit, but what alternative to mandatory retirement did you consider?

Mr. NESBITT. Well, the only alternatives we looked at were some kind of tests and testing.

Senator METZENBAUM. I will give you a man who is 55 years old, who is as strong as an ox—here is one man who says he can bench press 300 pounds, here is a man who says he jogs, he runs marathons, and he does everything else. Now, what do you want from him? Now you are saying to him: "You have got to go. You are just an old geezer, and we want to get you out of the way."

What did you do to consider alternatives to mandatory retirement?

Mr. NESBITT. We looked at tests, and we also concluded that tests are not valid.

Senator METZENBAUM. So what did you do to find an alternative to mandatory retirement?

Mr. NESBITT. The alternative we came up with was simply a wellness program.

Senator METZENBAUM. Mr. Nesbitt, isn't it really the fact that the only reason the fire fighters want this particular provision and want this law changed is so that the younger guys can push out the older guys and get their positions? Isn't that the real motivation?

Mr. NESBITT. No, that is not, Senator.

Senator METZENBAUM. I think it is, and many other people think it is. We want tests. I do not have any problem with tests, and neither does anybody else. The captain here does not have any trouble with tests. Mr. Landy does not have any trouble with tests. But the fact is you just want to push out the older guys, and the younger guys at the convention wanted this, so that now there will be openings for them.

Mr. Landy, do you want to respond to the comment that was made by Mr. Nesbitt, saying that they could not participate with you, and I think he also made some comments that you might want to respond to.

Mr. LANDY. Thank you, Senator.

There are just two points of fact that I will make for clarification. The first is that Mr. Nesbitt repeats a misstatement of fact that occurred in the House of Representatives subcommittee hearing, and that was that we did not even ask them for their data set.

In fact, in our written rebuttal to their critique, we submitted a letter from the IAFF to us, clearing indicating that we had examined their data and that their data was simply not sufficient for our study, that is, that their data did not identify exactly how an individual died, where the individual died, and sometimes even when the individual died.

The data that came from the National Fire Protection Association was infinitely more sophisticated, and we did use that.

So the simple fact that Dr. Nesbitt says we did not even ask is nonsense on the surface, and we have documentary evidence that we have already provided for the record that rebuts that.

Second, he asserts that we did not allow them to participate. We interacted with the IAFF no fewer than 24 times over the 22 months of the study. That included at least five face-to-face meetings including—and it is beyond me how he would not even remember this—the IAFF invited us to come to their national convention in Las Vegas in the summer of 1992 and to give a special briefing to 500 IAFF members who assembled in a conference room to listen to it.

We also gave briefings to the IAFF at their headquarters, and sent representatives to the IAFF to help them brief local presidents.

It is inconceivable to me that he could claim that we met with IAFF only twice, and as a result did not fulfill our responsibility to keep fully informed the stakeholders. It is nonsense.

Senator METZENBAUM. Do you want to respond to that briefly, Mr. Nesbitt?

Mr. NESBITT. Briefly. I would like to submit—I do not have it today, Senator, but I will submit it to you—a letter from Richard Duffey, who was the representative of the IAFF on this study that will refute this.

No. 2—

Senator METZENBAUM. Will it refute the fact that he spoke at your convention?

Mr. NESBITT. No, no. Speaking at the convention and briefing our executive board was after the study was completed. I mean, he briefed us on what the results were.

Senator METZENBAUM. Mr. Landy.

Mr. LANDY. Senator, it was not after the study was completed. We met with them in the summer of 1992 to tell them again what our methods were and procedures and asked for their advice as part of a free flow of discussion. A report was not submitted and completed until many months after that.

Mr. NESBITT. If I may submit the letter from Mr. Duffey, because again, he was the one who served on the committee and held the relationship.

Senator METZENBAUM. Yes, but obviously, this man says it was not before; and you testified that it was before.

Mr. LANDY. It was in 1991, Senator, not 1992.

Senator METZENBAUM. I have some difficulty with you, Mr. Nesbitt. You speak long and enthusiastically, but I think not so accurately.

I have a list of fire departments, including large cities, that do not have mandatory retirement and are apparently functioning very well. The cities include Harrisburg, PA; Waukegan, IL; Clayton County, GA; Cedar Rapids, IA; Gainesville, FL; Shreveport, LA; Fort Worth, TX; Tampa, FL; Palm Bay, FL, and a number of other cities.

And my question is if these cities can operate without mandatory retirement, why can't all of them? And obviously, Los Angeles has certainly got to be one of the largest fire departments in the country, and they are operating pretty well without it.

Captain Wall, you are going to be forced to retire under Los Angeles?

Mr. WALL. If H.R. 2722 is passed into law, the mandatory retirement age law, I will be forced off the job at the end of this year.

Senator METZENBAUM. I see; if the House bill passes, you will be forced to retire.

Mr. WALL. Yes, sir. Los Angeles City has no mandatory age retirement.

Senator METZENBAUM. Let me say, Mr. Nesbitt, that I am really concerned as to whether the International Union is representing its membership on this issue. I have talked to many fire fighters, including fire fighters from Ohio, who first told me that they support H.R. 2722, but when I asked why, they tell me that the International Union told them to support it. They also tell me they think fitness tests are a good idea.

I am left with the strong impression that the rank-and-file is supporting this bill simply because the International has pressured them into it. I really question whether you are representing your membership on this.

What have you done to ensure that you are representing them on this issue? Have you done any mail polling or anything, so that you really might get some idea as to whether all the fire fighters of this country, or all whom you represent by majority really favor mandatory retirement?

Mr. NESBITT. The only measure we have is our democratically-elected conventions, which meet every 2 years. We have over 2,000 delegates at the convention. The issue has come up on the floor four times as late as 1992, and a resolution supporting this position was unanimously endorsed. There were a number of States and locals who similarly endorsed the resolution.

Senator METZENBAUM. I have worked with the fire fighters over a period of many years, and I am really perplexed and have tried to figure out myself why the fire fighters union would want to force their members to retire against their will and are giving this issue such high priority.

It cannot be a safety measure, because it is clear that the public is better protected by a fit public safety force and that that comes with fitness tests, and that has not been the priority; the priority has been this bill.

My real question is what are the fire fighters really concerned about. Is it the pension system? Is it fear of failing fitness tests? What is it? What is the real motivation?

Mr. NESBITT. The real concern is really public safety—

Senator METZENBAUM. Come on, come one. Fire fighters do not just go out and fight in their convention and do not come down here to lobby their Congressmen and Senators because of public safety. There is another motive. It is a more personal motive than that. Nobody would believe you; your credibility is strained to believe that it is really a concern of public safety.

Mr. NESBITT. Well, included in that public safety of these officers is the safety of other fire fighters. You mentioned earlier to one of the previous witnesses about a person up on a high beam, walking, and why shouldn't he have a mandatory retirement age. The big difference is that in the case of a fire fighter, it is not an individual

decision. If a fire fighter in an emergency situation cannot perform, that affects other people. It affects other fire fighters. It places other fire fighters in danger. It places in danger the people that they are trying to service or trying to protect in that particular sense.

For example, if you and I are fire fighters, and we go in to do an interior fire suppression in a burning building, the only way I am going to get out of that building alive is basically if you come out alive also, because I am dependent upon you. And if a beam falls on me, or I fall through the floor, or my oxygen tank runs out, I have to count on you; I have to know that you are capable, that you are able to do the job—and that is the concern.

Senator METZENBAUM. Well, you are not a fire fighter, but you are a hired spokesman for them, and that is perfectly appropriate, and I do not find fault with that. My question is can you tell me of any single instance in the country where an over-age fire fighter has jeopardized the safety and security of his or her fellow fire fighters?

Mr. NESBITT. Well, I think what happens—and this is based on stories and people I have talked to of the members that I represent here today—what happens so many times in the fire department is a situation where, if you have some older fire fighters who are perhaps nearing retirement—for example, I spoke to a captain from Hoboken who said we had a burning building with a severe fire, very heavy black smoke, and when he decided to send five fire fighters into the building, he said, “I looked at one of them, who was about 57, nearing retirement, and I said, ‘Maybe you should not go in.’” He was concerned about whether he could make it in that intense heat and that intense black smoke, and so he sent four younger fire fighters in.

I do not have any absolute examples where I can say that on such and such a date, this happened, but I know that that practice happens within fire departments.

Senator METZENBAUM. Captain Wall, do you know of any instance in which an over-age fire fighter has been old not to go out on the job and do what has to be done?

Mr. WALL. No, I do not.

Senator METZENBAUM. And how old are you, sir?

Mr. WALL. Fifty nine and a half.

Senator METZENBAUM. Thank you very much, gentlemen. We appreciate your testimony, and we will proceed forward on this legislation.



Leadership Conference on Civil Rights

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STATEMENT OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS IN OPPOSITION TO H.R. 2722, THE AGE DISCRIMINATION IN EMPLOYMENT AMENDMENTS

Ralph G. Neas, Executive Director
May 12, 1994

The Leadership Conference on Civil Rights (LCCR) is pleased to submit this statement for the record of the hearing of the Senate Labor Subcommittee on H.R. 2722, the Age Discrimination in Employment Amendments in 1993, on April 19, 1994. The Leadership Conference opposes H.R. 2722, and any similar bills that would allow state and local governments to continue -- or to begin -- setting maximum hiring and retirement ages for some workers.

Mandatory retirement solely on the basis of age is discriminatory, and these bills would sanction that discrimination. They would allow state and local governments to forcibly retire, or refuse to hire individuals as police officers or firefighters solely because of their age. This amounts to discrimination based on stereotypical and unproven assumptions about a class of workers.

If the refusal to hire were based on race, sex, or religious affiliation, it would clearly be an act of discrimination and would not be allowed to stand. For years, Congress has prohibited this practice in federal laws protecting the civil rights of employees. Examples of such protective legislation include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Congress has also never permanently exempted an entire class of workers from the coverage of a major civil rights law, such as the ADEA. This is particularly uncalled for in this instance, since no evidence has been offered to support the allegation of the supporters of this bill that older workers are unfit. Congress must not destroy the integrity of a civil rights law and thereby deny people their right to work simply to cater to administrative convenience.

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Continued

Equality for a Free, Fair, Democratic Society

Numerous independent studies have concluded that age, and assumptions about age, are not good predictors of any individual's performance or competency as a police officer or firefighter. One study was commissioned by Congress and conducted by Pennsylvania State University and another was done by the FBI Academy/Major City Chiefs of Police Association.

The proposed legislation also flies in the face of action taken by Congress in 1986 specifically intended to phase out this overt age discrimination by the end of 1993. State and local governments were given seven years to eliminate age as a basis for hiring and firing municipal public safety officials. The legislative history of the 1986 amendments is clear about this being a phase-out period.

However, proponents of this legislation still seek to put these employees out to pasture, because they are deemed too old, and suddenly incapable of performing their lifesaving duties. Little or nothing was done to comply with the law during the seven year period. It is worth noting, however, that only half the states have a mandatory retirement age for state police; a very few have it for state fire marshals.

These studies, and the fairer practices of so many states and localities, make clear that age is a poor predictor of public safety and fitness. Rather, public safety is best-served when the fitness of all members of the police and fire department, regardless of age, are judged by neutral, non-discriminatory, job-related criteria.

The Supreme Court and many state and local employers have come to the same conclusion, and no evidence has ever been offered to prove that older public safety officials are less fit or competent, or the cause of more accidents, than their younger counterparts.

The Leadership Conference urges this Committee to bear in mind that, time and time again, Congress has rejected the argument that it is more convenient or "fair" to deny someone a job because he or she is of a particular demographic group, and, because of assumptions made about that group, is assumed to be unable to perform the job responsibilities. Exemptions to the broad mandate of the civil rights laws have repeatedly been rejected as unjustified.

Surely, it is clear that the same is true here. This legislation makes assumptions about the abilities of workers based on their age. That goes against the intent of Congress and efforts to protect the rights and freedoms of all Americans. The Leadership Conference on Civil Rights urges you to oppose this bill.

TESTIMONY OF COMMISSIONER MAURICE J. HANNIGAN
 CALIFORNIA HIGHWAY PATROL
 &
 GENERAL CHAIRMAN, DIVISION OF STATE AND PROVINCIAL POLICE OF
 THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

FIRST I WOULD LIKE TO THANK SENATOR METZENBAUM AND OTHER MEMBERS OF THE SUBCOMMITTEE FOR AFFORDING ME THE OPPORTUNITY TO SPEAK ON THIS VERY IMPORTANT ISSUE. ON BEHALF OF THE IACP, I AM HERE TODAY REPRESENTING POLICE CHIEFS ACROSS THE UNITED STATES MANY OF WHOM ARE MEMBERS OF THE IACP. THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IS A PROFESSIONAL ORGANIZATION COMPRISED OF OVER 14,500 TOP LAW ENFORCEMENT EXECUTIVES FROM THE UNITED STATES AND 76 NATIONS. IACP MEMBERS LEAD AND MANAGE SEVERAL HUNDRED THOUSAND LAW ENFORCEMENT OFFICERS AND CIVILIAN EMPLOYEES IN INTERNATIONAL, FEDERAL, STATE AND LOCAL GOVERNMENTS. MEMBERS DIRECT NORTH AMERICAN'S LARGEST POLICE DEPARTMENTS INCLUDING NEW YORK CITY, LOS ANGELES, TORONTO, CHICAGO, DETROIT, AND HOUSTON. THOUSANDS OF SUBURBAN AND RURAL POLICE AGENCIES THROUGHOUT THE WORLD ARE ALSO REPRESENTED.

I AM HERE TODAY TO URGE THIS SUBCOMMITTEE AND THE ENTIRE SENATE TO REINSTATE THE PUBLIC SAFETY EXEMPTION TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND TO MAKE THAT REINSTATEMENT RETROACTIVE TO DECEMBER 31, 1993.

THE HOUSE OF REPRESENTATIVES OVER A YEAR AGO ANTICIPATED WHAT EFFECT THE LOSS OF THIS EXEMPTION WOULD HAVE ON STATE AND LOCAL LAW ENFORCEMENT AND FIREFIGHTING AGENCIES ACROSS THE COUNTRY.

THE HOUSE SUBCOMMITTEE ON SELECT EDUCATION AND CIVIL RIGHTS OF THE COMMITTEE ON EDUCATION AND LABOR HELD HEARINGS ON THIS SAME TOPIC ON MARCH 24, 1993. AT THAT TIME MANY OF THE WITNESSES YOU ARE HEARING FROM TODAY TESTIFIED CONCERNING THE UNTENABLE POSITION AGENCIES WOULD FACE IF THE EXEMPTION WAS LOST. WE ARE NOW IN THAT SITUATION BECAUSE THE EXEMPTION HAS BEEN ALLOWED TO EXPIRE.

TO REMEDY THE SITUATION THE HOUSE OF REPRESENTATIVES DID PASS H.R. 2722 ON NOVEMBER 8, 1993. UNFORTUNATELY THE SENATE WAS PREOCCUPIED WITH OTHER LEGISLATIVE MATTERS AND DID NOT CONSIDER THIS ADEA EXEMPTION BEFORE IT CONCLUDED THE 1ST SESSION OF THE 103RD CONGRESS.

THE EXEMPTION EXPIRED AS A MATTER OF LAW AT THE END OF LAST YEAR AND NOW PUBLIC SAFETY AGENCIES ARE ATTEMPTING TO DETERMINE HOW TO DEAL WITH KEEPING THEIR FORCES FIT SO AS TO SATISFY THEIR DUTY TO PROTECT.

IF AGE CANNOT BE USED, PHYSICAL TESTING IS A POSSIBILITY. SETTING ASIDE FOR A MOMENT THE EXPENSE OF SUCH TESTING, THE ACTUAL TESTS THEMSELVES ARE A PROBLEM.

THE VALIDITY AND JOB RELATEDNESS OF THESE TYPES OF PHYSICAL TESTS HAS BEEN CHALLENGED IN COURTS REPEATEDLY. DEFENDING THESE LAWSUITS IS EXTREMELY EXPENSIVE AND TIME CONSUMING. AND WHILE THESE SUITS ARE IN COURT, THE AGENCIES ARE LEFT WITH GREAT UNCERTAINTY AS TO HOW TO HANDLE PERSONNEL MATTERS.

SINCE THE 1986 EXEMPTION WAS PASSED, CONGRESS HAS PASSED TWO OTHER PIECES OF LEGISLATION THAT FURTHER COMPLICATE THIS AREA. THE 1991 CIVIL RIGHTS ACT AND AMERICANS WITH DISABILITIES ACT GREATLY ADD TO THE DIFFICULTY IN DESIGNING PHYSICAL TESTS THAT WILL BE ADJUDICATED TO BE LAWFUL WHILE AT THE SAME TIME NOT VIOLATING THE CIVIL RIGHTS OF OTHERS.

WE BELIEVE H.R. 2722 GETS US THRU THIS MAZE WITH THE LEAST DIFFICULTY. PUBLIC SAFETY AGENCIES ARE LOOKING FOR GUIDANCE AND SAFE HARBORS IN THIS AREA. WE BELIEVE H.R. 2722 GIVES IT TO US.

LETS LOOK AT HOW WE GOT TO THE POSITION WE ARE IN TODAY - ASKING FOR A REINSTATEMENT OF THE EXEMPTION:

IN 1986 CONGRESS DEBATED AND PASSED AN AMENDMENT TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) WHICH BARS MOST EMPLOYERS FROM SETTING MANDATORY RETIREMENT AGES. DURING THAT DEBATE, CONGRESSMAN MURPHY OFFERED AN AMENDMENT WHICH CREATED A SEVEN-YEAR EXEMPTION FOR PUBLIC SAFETY AGENCIES WHICH PASSED WITH A 394-0 VOTE (EXEMPTION EXPIRED DECEMBER 31, 1993). DURING THE SEVEN-YEAR EXEMPTION PERIOD, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) WAS MANDATED BY CONGRESS TO CONDUCT A STUDY TO ADDRESS THE FOLLOWING THREE ISSUES: 1) DETERMINE WHETHER PHYSICAL AND MENTAL FITNESS TESTS ARE VALID MEASUREMENTS OF THE ABILITY AND COMPETENCY OF POLICE OFFICERS AND FIREFIGHTERS TO PERFORM THE REQUIREMENTS OF THEIR JOBS; 2) IF SUCH TESTS ARE FOUND TO BE VALID MEASUREMENTS OF SUCH ABILITY AND COMPETENCY, DETERMINE WHICH PARTICULAR TYPES OF TESTS MOST EFFECTIVELY MEASURE SUCH ABILITY AND COMPETENCY; AND 3) DEVELOP RECOMMENDATIONS WITH RESPECT TO SPECIFIC STANDARDS THAT SUCH TESTS AND THE ADMINISTRATION OF SUCH TESTS SHOULD SATISFY.

IN SEPTEMBER 1990, THE EEOC AWARDED THE STUDY'S CONTRACT TO PENNSYLVANIA STATE UNIVERSITY (PSU). PSU PRESENTED A REPORT TO THE EEOC IN DECEMBER 1991 WITH THE RECOMMENDATION THAT PUBLIC SAFETY POSITIONS NO LONGER BE EXEMPT FROM ADEA. IT IS IMPORTANT TO POINT OUT THAT THE PSU STUDY AND RESULTING REPORT FAILED TO SATISFY THE MOST IMPORTANT PARTS OF THE CONGRESSIONAL MANDATE. THE REPORT SIMPLY FULFILLS PART (1) WITHOUT ADDRESSING THE MORE DIFFICULT AREAS OF THE STUDY AND THE REAL WORLD BUSINESS NECESSITIES MANDATED IN PARTS (2) AND (3). SPECIFICALLY, TO IDENTIFY THE PARTICULAR TYPES OF TESTS TO MEASURE PHYSICAL AND MENTAL FITNESS, PART (2), AND TO DEVELOP SPECIFIC STANDARDS UNDER WHICH TO ADMINISTER THESE TESTS, PART (3). FURTHERMORE, THE REPORT DISREGARDS OR DISMISSES RECENT LITERATURE ON ATTENTION SPAN, DISTRACTION, REACTION TIME, VISION AND AUDITION, PARTICULARLY AS THOSE CHARACTERISTICS DETERIORATE WITH AGE WHICH WE BELIEVE TO BE JOB-RELATED TO PUBLIC SAFETY BY ONLY COMPLETING PART (1) OF THE MANDATE. MOREOVER, IT WOULD APPEAR THAT THIS WAS AN EFFORT ON THE EEOC'S PART TO GET THEIR DESIRED RESULT, TO LET THE EXEMPTION EXPIRE, WHILE REMOVING THE POSSIBILITY OF ANY FUTURE AGE-BASED DEFENSES FOR PUBLIC SAFETY. THIS OPINION IS ALSO SUPPORTED BY MY STAFF'S PAST DISCUSSION WITH DR. FRANK LANDY, PRINCIPLE INVESTIGATOR FOR THE PSU STUDY. IN THIS DISCUSSION IT WAS LEARNED THAT PSU QUERIED THE EEOC REGARDING THEIR (PSU'S BELIEF THAT PARTS (2) AND (3) OF THE CONGRESSIONAL MANDATE WEREN'T BEING ADDRESSED AND NEEDED TO BE. EEOC'S RESPONSE WAS THAT PSU'S ONLY ASSIGNMENT WAS PART (1).

CLEARLY, EEOC HAS KNOWINGLY AVOIDED MANDATES (2) AND (3). YET, FROM THE PERSPECTIVE OF PUBLIC SAFETY, THESE MANDATES WERE A SIGNIFICANT REASON FOR THE "TEMPORARY" CLAUSE IN THE 1986 ADEA PUBLIC SAFETY EXEMPTION. MOREOVER, THERE WAS NO GUARANTEE THAT THE EEOC COULD VALIDATE AND STANDARDIZE THE PARTICULAR TYPES OF TESTS TO MEASURE PHYSICAL AND MENTAL FITNESS AND DEVELOP SPECIFIC STANDARDS UNDER WHICH TO ADMINISTER THESE TESTS. IF THE EEOC COULDN'T ACCOMPLISH THIS TASK [MANDATES (2) AND (3)], THEN IT WOULD BE UNREASONABLE TO PLACE THE BURDEN ON INDIVIDUAL LOCAL AND STATE PUBLIC SAFETY AGENCIES. THIS WOULD THEN ARGUE FOR PUBLIC SAFETY'S CONTINUED UTILIZATION OF AGE STANDARDS. FOR EXAMPLE, IF IT WAS NOT POSSIBLE TO DEVELOP THESE TESTS AND STANDARDS, THEN AGE SHOULD BE THE ONLY CRITERION FOR MANDATORY RETIREMENT AND THEN THE UNASSAILABLE

ARGUMENT COULD BE MADE TODAY THAT THE PUBLIC SAFETY EXEMPTION BE PERMANENT. INSTEAD, SINCE THESE MANDATES WERE NOT ADDRESSED, AND THE EXEMPTION EXPIRED, EACH PUBLIC SAFETY AGENCY IN THE COUNTRY IS REQUIRED TO ATTEMPT TO DEVELOP THEIR OWN TESTS AND STANDARDS TO BE USED IN LIEU OF AGE.

PRIOR TO THE 1986 EXEMPTION, THE EEOC WAS VERY ACTIVELY PROSECUTING POLICE AGENCIES FOR AGE-BASED DISCRIMINATION SUITS. THESE AGE-BASED SUITS ULTIMATELY RESULTED IN VARIOUS INCONSISTENT APPELLATE COURT RULINGS CONCERNING THE SUBJECT OF AGE STANDARDS FOR POLICE AGENCIES WHICH CREATED DISARRAY AND CONFUSION REGARDING WHAT THE "LAW" WAS. THESE INCONSISTENCIES WERE ONE OF THE COMPELLING REASONS TO ATTEMPT THE PUBLIC SAFETY EXEMPTION FROM THE ADEA WHICH WAS ULTIMATELY PASSED IN 1986.

AT THIS TIME, EVEN THOUGH CONGRESS MANDATED THAT THEY BE DEVELOPED, THERE IS STILL NO EVIDENCE THAT THE JOB-RELATED TESTS OF MENTAL AND PHYSICAL FITNESS CAN BE ESTABLISHED. OBVIOUSLY, EVEN IF MOST PUBLIC SAFETY AGENCIES KNEW THE TESTS AND STANDARDS COULD BE DEVELOPED, THE AGENCIES GENERALLY CAN'T AFFORD TO FUND THESE COSTLY VALIDATION STUDY EFFORTS. MOREOVER, EVEN IF AGENCIES HAD THE MONEY, THE EEOC WOULD ACTIVELY PROSECUTE THE JOB-RELATEDNESS RESULTING FROM THESE HUNDREDS OF SEPARATE AND DIFFERENT TESTS AND STANDARDS. THIS WOULD, ONCE AGAIN, UNDOUBTEDLY RESULT IN INCONSISTENT APPELLATE COURT RULINGS AND DISARRAY AND CONFUSION NATIONALLY REGARDING WHAT IS THE "LAW" IN THE ADEA. THIS WOULD PLACE PUBLIC SAFETY BACK IN THE SAME PRECARIOUS SITUATION WE FOUND OURSELVES IN PRIOR TO 1986.

CONSEQUENTLY, IN THE ABSENCE OF A MAXIMUM HIRING AND RETIRING AGE, POLICE AGENCIES WILL NOT ONLY DEVELOP OLDER, LESS PRODUCTIVE, LESS FLEXIBLE POLICE FORCES, BUT ALSO BE FORCED TO HIRE 40, 50 AND 60 YEAR OLD RECRUITS. UNDER THE ADEA, IF AN AGENCY HAS A 60 YEAR OLD RECRUIT, POLICE OFFICERS MUST BE PHYSICALLY AND MENTALLY FIT TO PURSUE AND ARREST INCREASING NUMBERS OF VIOLENT CRIMINALS, YET AT THE SAME TIME USE DEADLY PHYSICAL FORCE ONLY AS A LAST RESORT. THERE IS ALSO A CONCERN ABOUT AGED OFFICERS BECOMING "FIREARM DEPENDENT", NOT BEING SUFFICIENTLY CONFIDENT IN THEIR PHYSICAL SKILLS AND RELYING TOO HEAVILY ON THEIR FIREARM TO SUBDUCE A YOUNG, PHYSICALLY SUPERIOR PERPETRATOR WHILE EFFECTING A LAWFUL ARREST.

ADDITIONALLY, THE LOSS OF AGE-BASED RETIREMENT WILL CAUSE STAGNATION AT THE TOP OF POLICE ORGANIZATIONS. THE YOUNG PEOPLE, UPWARDLY MOBILE, MANY WITH COLLEGE EDUCATION, WILL THEN HAVE LIMITED CAREER OPPORTUNITIES IN POLICE ORGANIZATIONS. THIS STAGNATION IN THE RANKS WILL REDUCE OPPORTUNITY FOR MINORITIES AND WOMEN TO RISE IN THE MANAGEMENT RANKS. AS A RESULT, THE AFFIRMATIVE ACTION PROGRAMS, THAT POLICE AGENCIES HAVE WORKED SO DILIGENTLY TO DEVELOP AND SUPPORT, WOULD BE UNDERMINED AND INEFFECTIVE.

WHILE I STRONGLY OPPOSE AGE DISCRIMINATION, I BELIEVE THAT STATES AND MUNICIPALITIES SHOULD BE ALLOWED TO DETERMINE RETIREMENT AND HIRING AGES FOR THEIR OWN POLICE OFFICERS AND FIREFIGHTERS, JUST AS CONGRESS HAS DONE FOR CERTAIN CLASSES OF FEDERAL GOVERNMENT WORKERS WHO REGULARLY FACE UNIQUE MENTAL PHYSICAL DEMANDS. FOR EXAMPLE, FEDERAL LAW ENFORCEMENT OFFICERS MUST RETIRE AT AGE 57 AND FEDERAL FIREFIGHTERS MUST RETIRE AT AGE 55. CLEARLY, THE LINE-LEVEL POLICE POSITIONS AT LOCAL AND STATE LEVELS REQUIRE GREATER PHYSICAL DEMANDS THAN MOST FEDERAL PUBLIC SAFETY POSITIONS.

IN CONCLUSION, THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE BELIEVES THAT THE LAW ENFORCEMENT EXEMPTION TO THE ADEA IS VITAL TO THE CONTINUED VITALITY OF POLICE AGENCIES ACROSS THE NATION. I URGE

YOU TO FOLLOW THE HOUSE OF REPRESENTATIVES AND ENACT LEGISLATION THAT WOULD RESOLVE THIS INCONSISTENCY IN THE LAWS GOVERNING FEDERAL AND STATE LAW ENFORCEMENT PERSONNEL AND GRANT STATES AND LOCALITIES THE RIGHT TO DETERMINE FOR THEMSELVES THE MOST APPROPRIATE RETIREMENT AND HIRING AGES FOR THESE CLASSES OF WORKERS.



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STATEMENT OF THE
INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION
ON H.R. 2722
SUBCOMMITTEE ON LABOR
APRIL 19, 1994

The International Personnel Management Association (IPMA) supports the enactment of legislation (H.R. 2722) that would make permanent the exemption contained in the Age Discrimination in Employment Act of 1967 (ADEA), which allowed State and local governments to set maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers. The Association believes the exemption needs to be reinstated retroactively because of the potential impact on public safety.

IPMA is an organization representing over 1,400 member agencies that include civil service commissions, merit system boards and personnel departments at the federal, state, and local levels of government. The Association also represents 65,000 individuals, primarily human resource professionals and managers in the public sector and educators in the fields of public administration and personnel management. IPMA's objective is to develop an interest in sound human resource management and provide a focus and a forum for the discussion and exchange of views among practitioners and theoreticians throughout the United States and abroad.

The Association has a long history of active support of equal employment opportunity and affirmative action. IPMA opposes all forms of discrimination including age discrimination, but believes that due to the unique nature of public safety positions, it is important that the exemption contained in the ADEA be reinstated and made permanent. This exemption provided state and local governments with the ability to determine appropriate hiring and retirement ages for law enforcement officers and firefighters and allowed jurisdictions to retain the separate pension systems that have been established for individuals in these occupations.

When this exemption was originally considered by Congress in 1986, Senator Wendell Ford accurately observed that "elected State and local officials are in the best position to determine the public safety needs of their constituencies. I do not believe that these elected officials fashion hiring and retirement policies to purposely evade the requirements of the ADEA...The requirement that

hiring and retirement ages be based on a bona fide plan also ensures that such discrimination will not occur."

The 1986 exemption directed that a study be undertaken and guidelines be promulgated by the Equal Employment Opportunity Commission (EEOC) on the administration and use of physical and mental fitness tests for police officers and firefighters. While the study has been conducted, the EEOC has failed to issue guidelines that would provide assistance in the administration and use of these tests. With the expiration of the ADEA exemption on December 31, 1993, the report to accompany H.R. 2722 prepared by the Committee on Education and Labor accurately notes that state and local governments will be subjected to the "uncertainty, expense, and irreconcilable results of litigation simply because the EEOC failed to fulfill its statutory obligation."

Prior to the passage of the 1986 exemption, there were a number of conflicting decisions issued by federal courts concerning whether maximum hiring ages and mandatory retirement ages for firefighters and police officers constituted a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the Fire Department or Police Department. The Association concurs with the following observation contained in the report of the Education and Labor Committee:

That tangled thicket of judicial decisionmaking resulted in the application of the same age limits to similar or identical policing or firefighting jobs being permissible in some cities, towns, counties, and States across America but illegal in others. No State or locality could be sure of the legality of its hiring and retirement policies. About the only thing every State and locality could be sure of was having to expend scarce financial resources to defend their policy regardless of the outcome of a challenge to the application of the same age to a similar or identical job in another jurisdiction. Moreover, it was well-nigh impossible to administer a pension plan and manage personnel needs in the face of such anomalous results.

As a result of the expiration of the exemption, state and local governments are now faced with the same situation that existed prior to the passage of the exemption. There is uncertainty among state and local governments since the EEOC has not provided the guidance that Congress mandated. There also is concern due to the potential litigation that could result from an increased use of performance tests. H.R. 2722 would require another study to be undertaken to identify tests that adequately measure the ability of police officers and firefighters to continue to perform in public safety positions. H.R. 2722 also would direct the EEOC to develop guidelines on the use and administration of such tests. The Association supports the inclusion of both of these provisions in the legislation.

The Association also notes that the federal government imposes maximum hiring ages and mandatory retirement ages for federal public safety personnel such as federal firefighters, United States Park Police, the Capitol Police, and agents of the Federal Bureau of Investigation. The Association recognizes that Senator Mettenbaum recently introduced legislation (S. 1984) that would repeal the mandatory retirement age for federal public safety officers. The Association believes that Congress should apply the same requirements to federal, state, and local governments.

IPMA urges the Subcommittee to approve H.R. 2722 and make permanent the exemption contained in the ADEA that allows state and local governments to use maximum hiring ages and mandatory retirement ages for public safety officers. The Association recommends that the Subcommittee amend the legislation to make it retroactive to the date the exemption expired.

TESTIMONY OF THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

I. Introduction

The International Brotherhood of Police Officers (IBPO) is and affiliate of the Service Employees International Union, the fourth largest union in the AFL-CIO. The IBPO represents more than 40,000 federal, state, and local rank and file law enforcement officers across the country, and is the largest police union in the country. As a labor organization, the IBPO represents street cops--those who each day put their lives on the line to protect their communities. The IBPO through its membership strongly supports legislative efforts to permit the use of maximum hiring ages and mandatory retirement ages for state and local firefighters and law enforcement officers.

Although this legislation affects both firefighters and police officers, we will confine our testimony to the impacts on police officers. The IBPO supports an amendment to the Age Discrimination in Employment Act which allows state and local governments to utilize mandatory retirement ages because: (1) age provides a more reliable indicator of physical ability than physical and mental fitness tests; (2) age based criteria protects public safety and the safety of other officers; (3) age provides a workable objective standard for retirement; and (4) a statutory exemption enables police departments to avoid costly litigation with disparate results. The IBPO supports H.R. 2722, The Age Discrimination in Employment Amendments of 1993, and urges its adoption by the Senate.

II. Legislative Background

The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§621 et seq.) legislates that employers must not use mandatory retirement ages to force employees to retire. However, because of a 1986 Congressional amendment, police and fire departments were allowed to continue to use mandatory retirement ages. Also in the 1986 amendment, Congress mandated a study to determine the efficacy of fitness tests, which we will discuss in our testimony below. The 1986 amendment included a seven year exemption from the ADEA which expired on December 31, 1993. The IBPO feels that this exemption should be retained so that state and local governments may continue to use age-based criteria for retirement decisions.

One reason behind Congress' decision to carve out this exemption from the ADEA in 1986 is that it would be unreasonable to require state and local governments to be held to more restrictive laws than the federal government. Congress has specifically mandated a retirement age for federal firefighters, U.S. Park Police, the Capitol Police, and many other categories of federal public safety officers. Mandatory retirement ages have worked well in the federal law enforcement sector. We believe state and local governments should likewise be allowed to establish age-based criteria for their public safety officers.

H.R. 2722, introduced by Rep. Major Owens in the first session of the 103rd Congress, was unanimously approved by the House Subcommittee on Select Education and Civil Rights. It was unanimously approved by the full House Education and Labor Committee. It was passed the full House of Representatives by voice vote on the suspension calendar, which, as you know, is reserved for non-controversial items.

As H.R. 2722 made its way through the legislative process, an amendment was offered that authorized states and localities to develop and utilize physical and mental fitness tests if they so wished. However, they would not be forced to. Given the paucity of information about appropriate performance standards and the great uncertainty about the effectiveness of performance tests, Congress should not force every public safety agency to use such tests. IBPO and a coalition of organizations supporting H.R. 2722 worked with the sponsors of the amendment to craft this thoughtful, helpful addition to the bill which allows, but does not force, state and local governments to use such tests. We view H.R. 2722 as amended as a legitimate compromise on this important safety issue. Given the overwhelming Congressional support thus far, we believe this legislation providing a continuing exception is overdue.

III. Why an Amendment to the ADEA which would allow use of age-based criteria is necessary

A. Age currently provides a more reliable indicator of physical ability than physical and mental fitness tests

In 1986, Congress mandated the EEOC and the Department of Labor to conduct a study to determine if physical and mental fitness tests are valid measures of ability of police and firefighters to perform requirements of their jobs, which tests are most effective, and which specific standards such tests satisfy. Researchers from Penn State conducted this study which concluded that although age is a determinant of an individual's ability to perform the functions of a police officer or a fire fighter, there is no exact age at which all people can be said to be unqualified. While we agree with this statement, it does not necessarily follow that age-based retirement ages are illegitimate.

Tremendous practical problems exist with the summary conclusions of the Penn State Study. For example, while the study recommended the use of fitness tests as an alternative to age-based retirement, it failed to identify any specific physical or mental fitness tests. Further, it failed to even offer any recommendations as to specific standards that should be satisfied by such tests. The EEOC also failed to promulgate guidelines to assist state and local governments to administer and use physical and mental fitness tests instead of age-based policies.

The IBPO, therefore, has several questions which must be answered conclusively before Congress mandates state and local governments to use tests. Can a test simulate the entire range of public safety tasks including an individual's response to mass civil disobedience and other emergency situations, or to combative, resistive arrestees? Can such tests effectively screen out individuals who are at risk of sudden incapacitation? The Penn State study completely failed to answer these questions. The IBPO believes that currently these questions do not have legitimate answers.

Not only did this study fail to determine if mental and physical tests could be effectively used, it also was based on significant errors. A comprehensive review of the study found serious flaws in data collection, data analysis, and study selection. Most significantly, the study's recommendations are based on inferences that are not supported by any data. In real world situations, as opposed to laboratory settings, age has proven to be a more reliable indicator of physical fitness than medical testing.

Though the Penn State Report looked at performance tests used by law enforcement agencies to select entry level personnel, it did not evaluate the effectiveness, reliability of validity of such tests generally. Incredibly, the study failed to evaluate the appropriateness of the use of such tests to evaluate incumbent public safety officers. The Report itself even notes that many of the research studies on efficacy of testing must be "interpreted with caution" because such studies did not include

older individuals in the sample group. The Report goes on to say that most of the studies tested only individuals under age fifty. The IBPO finds it absolutely incomprehensible that a study can claim to make conclusions about what older people can or cannot do when the researchers have not even studied older people!

And, to add horror to disbelief, reports have since surfaced that the firefighters' entrance examination has been halted in several jurisdictions after at least a dozen candidates who took the test suffered kidney failures. The Boston Herald, on November 25, 1993, reported that at least 12 candidates have been hospitalized for up to 10 days for acute kidney or renal failure, within days of taking the exam at various sites across Massachusetts. Many of those injured in Massachusetts, including a physically fit 34 year old, have pointed to a rigorous stair-climbing event, in which test-takers, with 50-pound tanks strapped to their backs, drag fire equipment up and down two flights of stairs in six trips, as the source of their injury. Complications from renal failure have been blamed for the 1988 deaths of two young, physically fit men, aged 25 and 24. It is horrifying to think of what the results might be if a test that sends young men to intensive care or results in death is required to be taken by 65 year olds.

The Boston Herald article also quotes Frank Landy, a Pennsylvania-based sports psychologist and consultant who has developed exams similar to the Massachusetts test. Landy has said that the stair climbing event could not be a contributing factor to renal failure and suggested that the men may have overtrained for the event and that the state's administration of the test may be flawed. "Maybe the people administering the test need to be much more cautious about the screening of those people taking the exam," Landy said. If departments were to take this hollow advice, then it is absolutely ludicrous to subject much older employees to these potentially deadly tests.

Incredibly, this Frank Landy who makes and promotes the use of these tests and thus profits off of the utilization of these tests is the very same Frank Landy who authored the Penn State Report which concluded that tests should be used instead of age based criteria. In testifying before the Subcommittee on Select Education and Civil Rights hearing on March 24, 1993, Dr. Landy again promoted the use of tests. The IBPO finds it very unwise, bordering on scandalous, to place such great reliance on a study whose analyses are imprecise and flawed, and whose conclusions are self-motivated by the desire to promote ones own industry.

In the face of all this incredible evidence of the deficiencies and the hazards of tests, it should come only as an afterthought to consider the fiscal cost. The costs of these as of yet unidentified tests would include not only the administrative costs associated with developing and administering tests, but also the costs associated with a defense of the testing program and standards in the context of litigation. Even the Penn State Report found that it is likely that legal challenges to retirement decisions will increase if tests replace age as the criterion.

B. The Use of Age-Based Criteria Protects Public Safety and the Safety of Other Officers

There are many compelling reasons for continuing to use mandatory retirement ages for police officers. While the IBPO supports the intent of the ADEA, we believe that special consideration must be given to safeguarding public safety. Because officers perform tasks requiring great physical exertion and extreme stress, they must be in reliable physical shape. There are serious consequences when police officers fail to properly respond and control critical incidents, including serious physical injury or death of citizens, and significant property damage. Police departments must always be prepared for the worst case scenarios and have sufficient numbers of

individuals qualified and able to meet the challenges, no matter what the crisis.

Older public safety officers are more likely to suffer catastrophic medical events, such as heart attacks, thereby jeopardizing the safety of their fellow officers, as well as increasing more expensive duty disability retirements. Because older people slowly lose essential, job-related skills over time, the safety of fellow officers and the public-at-large may be placed at risk. It is hardly realistic to expect 65 year old officers to expend the amount of physical energy necessary to subdue young and violent criminals. Even the Penn State study found that if state and local public safety agencies did not use age-based criteria, an estimated 8.75 events per 100,000 public safety officers per year would occur in which people die or are injured as a result of the sudden incapacitation of a public safety officer.

If police officers cannot adequately perform their duties, people could die or get hurt. The House Report to accompany H.R. 2722 reported: "Age affects an individual's ability to perform public safety duties; that conclusion is neither a stereotype nor an unproven assumption; it is medical fact." (H.Rpt. 103-314, at 9.) This medical fact is derived from the very same report that vaguely concluded that age is an imprecise predictor of decline in ones ability, the Penn State report. Indeed, despite its conclusions, the Penn State report found: physical ability declines with age, e.g., aerobic capacity declines at a rate of 1 percent per year after age 30; strength declines at a rate of 10 to 13 percent every decade; and, the risk of sudden incapacitation increases six-fold between the age of 40 and 60.

We recognize that Congress should act with caution when exempting categories of employees from protections of civil rights laws. However, if older police officers who are unable to perform their jobs are retained on the force as required by the ADEA without this amendment, people will die or get seriously injured. The lives and property of citizens must not be sacrificed to obtain an appearance of nondiscrimination. Protecting public safety is a compelling reason to justify this exemption.

C. Age Provides a Workable Objective Standard for Retirement

While we appreciate the position of those opposed to H.R. 2722 as preventing discrimination, the IBPO submits that more discrimination will result if this exception fully expires. A mandatory retirement age is preferable to subjecting officers to yearly physical fitness tests not only because of the above mentioned inherent problems with tests, but also because the use of these tests may be left to the discretion of department heads to prematurely force officers out of their jobs. Additionally, the potentially negative impact that tests may have on individuals and groups that historically have been discriminated against in employment is well documented. Tests can be used inappropriately to target or harass employees and are the source of great anxiety for many employees. Thus with all the problems with these tests, it is much preferable to have a set age limit at which all officers will know that once they reach that age, they will retire.

D. A statutory exemption to the ADEA enables police departments to avoid costly lawsuits with disparate results.

With all the evidence pointing to the use of age as a more reliable indicator of physical ability than fitness tests, state and local governments seeking to protect public safety will continue to rely on age based criteria, just as they did prior to the 1986 amendment to the ADEA which exempted police and fire departments. If the statutory exemption to the ADEA is not continued, departments that wish to use a mandatory retirement age will have to prove that age is a Bona Fide Occupational

Qualification (BFOQ), reasonably necessary to the normal operation of business. Parties to a dispute over the use of retirement age limits have been forced to litigate their disputes in court. The results from cases litigated before the 1986 exemption have been wildly different and caused great uncertainty within police departments as some jurisdictions found limits permissible and other jurisdictions found the very same limits impermissible. In addition to causing legal disarray, lawsuits over BFOQs are extremely costly, causing both the employers and the employees to needlessly stretch their very tight budgets.

IV. Conclusion

Tests can not accurately gauge the ability of public safety officers to perform their duties. The Penn State study that concluded otherwise is seriously flawed - both in its analyses and the self interested motivation underlying its conclusion. Tests bring with them a great fiscal cost - in developing and administering, and defending against law suits. If police officers are unable to perform their duties, people will die. Public safety is too important to sacrifice just to obtain a thin veneer of protection of civil rights. For all these reasons, it is imperative that Congress enact this amendment and allow state and local police and fire departments to continue to use mandatory retirement ages.

Firefighter test designer: No complaints until now

By MAGGIE MULVILL

The designer of the state firefighters examination, which has been halted after at least a dozen candidates suffered kidney failure, said either he, the victims, did not prepare properly or the state didn't correctly administer the test.

"I don't know what's going on," said Frank Landy, a Pennsylvania-based sports

psychologist and consultant who has developed similar exams in several other major cities, including New York and Washington, without incident.

"But I do know that after having administered this test to thousands of other people, we have never even had a complaint about renal failure."

At least 12 candidates have been hospitalized for re-

nal complications. Some renal failure has been blamed for the 1988 deaths of two young, physically fit men: Timothy Sheard, 25, a Massachusetts State Police cadet, and Fred Padilla, 24, who collapsed while taking the New York City fire department's physical exam.

The New York exam was suspended several times in 1988 and 1989 after continuing reports that test-takers

suffered subsequent kidney failure.

"It was totally discontinued altogether," said Denise Collins, a spokeswoman for the city's Personnel Department, which administered it.

Landy was hired to develop a new test for the city, which will be given next year, he said.

Many of those injured in Massachusetts have pointed to a rigorous stair-climbing event — in which test-takers, with 50-pound tanks strapped to their backs, lift the equipment up and down two flights of stairs in six tries — as the source of their injury.

"I know in my heart I was injured as soon as I got off those stairs," said Joseph Good, 41, of Woburn, whose six-month training regimen including running up and down stairs at two local stadiums.

"I consider myself to be in prime physical condition, but I would never take that test again. You are taxed to do something that is beyond human capability."

Good spent four days at Winchester Hospital, where he received constant supplies of intravenous fluids to rehydrate him after his kidneys shut down.

"The doctors were grateful I went in when I did, because my life was on the line," he said.

But Landy, who has been developing firefighters physical exams for 15 years, said the stair-climbing event could not be a contributing factor to renal failure.

"To and of itself it is not a dehydrating event because the duration is not sufficiently long for any substantial loss of water," he said.

He said "candidates may have substantially strained their system by overtraining for the event, and he added that the state's administration of the test at exam sites may also be flawed.

"Maybe the people administering the test need to be much more cautious about the scheduling of those people taking the exam," Landy said.

Meanwhile, officials from the Department of Personnel Administration, which is responsible for the administration of the test, remained tight-lipped yesterday about their decision to cease testing pending a further safety review.

DPA officials met with investigators from the state attorney general's office yesterday to discuss the examination. Sources close to the investigation said

MEDICAL PRIMER

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to 10 days — some in intensive care units — within days of taking the exam at various sites across Massachusetts.

Acute kidney or renal failure forces the kidneys to suddenly stop functioning, generally within days or hours of great physical exertion.



OFFICE OF
THE CHAIRMAN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

September 22, 1993

The Honorable William D. Ford
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Ford:

This is in response to your July 30, 1993 request for the Equal Employment Opportunity Commission's views on H.R. 2722, the "Age Discrimination in Employment Amendments of 1993".

H.R. 2722 would amend the Age Discrimination in Employment Act in two general respects. First, all state and local governments would be permitted to use age as a basis for hiring and retiring law enforcement officers and firefighters. Second, the bill would prohibit state and local governments from retiring elected judges who attain the age of compulsory retirement prior to the expiration of a judge's term of office. If the amendments are signed into law, the pertinent parts of the ADEA would read as follows:

Sec. 4(j) It shall not be unlawful...to fail or refuse to hire or to discharge any [law enforcement officer or firefighter] because of such individual's age if such action is taken --

- (1) with respect to...an individual...[who]...has attained
 - (A) the age of hiring and retirement in effect under applicable state or local law on March 3, 1983; or
 - (B) if such age was not in effect under applicable state or local law on March 3, 1983, 55 years of age...

Sec. 11(f) The term "employee" means an individual employed by any employer except that the term...shall not include any person elected to public office in any state or political subdivision...by the qualified voters thereof... The exemption set forth in the preceding sentence...shall not include with respect to retirement an elected judge before the expiration of the term of office in which such judge attains the age of compulsory retirement.

The EEOC has reviewed H.R. 2722 and we provide the following substantive and technical comments:

GENERAL COMMENTS

First, we address the law enforcement and firefighter provisions in section 4(j). As you know, the 1986 ADEA Amendments created a temporary exemption permitting age-based hiring and retirement decisions in these public safety occupations through December 31, 1993. At the same time, Congress charged the EEOC and the Department of Labor with conducting a study to determine whether tests are available that could replace the use of age as a predictor of job performance. The central research questions were:

If one wanted to replace age with performance or capacity tests, would it be possible? Are there job-related tests that are practical, safe and cost effective? If so, can the tests be fairly administered without unduly compromising personal safety, public safety, or agency efficiency?

In October 1992, this study¹ -- organized and structured by researchers from Penn State University -- was sent by the two agencies to Congress. The Study Group concluded that (1) age is a poor predictor of performance in public safety occupations, (2) practical tests are currently available that are better predictors, and (3) the temporary exemption should be permitted to expire as scheduled. H.R. 2722 rejects all of the above conclusions by, in essence, making permanent the exemption created in 1986. Moreover, Section 2(a)(B) is more expansive than the current exemption in that it permits the use of age even by state and local governments that had not implemented age limitations for public safety officers in prior years.

If signed into law, H.R. 2722 would undercut years of EEOC litigation (pre-1987) in which we routinely challenged the use of arbitrary age limitations by police and fire departments. Further, the proposed amendment to permit State and local governments to require the retirement of firefighters and law enforcement officers as early as age 55 is inconsistent with a substantial body of case law which has been developed previously under the ADEA that prohibited mandatory retirement of law enforcement officers and firefighters on the basis of an arbitrary age cut-off. See e.g. EEOC v. Kentucky State Police Dept., 860 F.2d 665 (6th Cir. 1988), cert. denied, 49 FEP Cases 1640 (1989); EEOC v. Pennsylvania State Police, 829 F.2d 392 (3rd Cir. 1987); EEOC v. Mississippi State Tax Commission, 873 F.2d 97 (5th Cir. 1989) (*en banc*).

Finally, we address the elected judges portion of H.R. 2722. Currently, the ADEA contains a blanket exemption for persons elected to public office by the qualified voters of a state or political subdivision of a state. H.R. 2722 would make an adjustment in this blanket exemption solely for elected judges. Under the bill, an elected judge would be entitled to complete his term of office even though attaining mandatory retirement age in advance of the full term. While it is unclear why this bill is being offered, its objective of removing one use of an arbitrary age limitation is in keeping with the spirit of the ADEA. On the other hand, the ADEA and Title VII have contained blanket exemptions for elected public officials since their dates of enactment. Thus, this bill affects a long-settled aspect of civil rights law.

TECHNICAL COMMENTS

Subsection (A) of H.R. 2722 would permit both maximum hiring ages and mandatory retirement ages. Subsection (B), to be applied when (A) is inapplicable, permits only mandatory retirement at age 55. This omission regarding maximum hiring ages may produce the curious circumstance of departments having to prove that age is a bona fide occupational qualification for hiring decisions even though they would have a specific statutory right to use age for retirement decisions.

¹ Edwards, R. *Mandatory Retirement: Police, Fire Fighters and Tenured Faculty*, Public Administration Review, Vol. 53, No. 4, 1993.

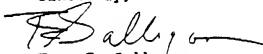
² Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, Volume I: Technical Report, Center for Applied Behavioral Sciences, Pennsylvania State University, (University Park, PA: Intercollegiate Research Programs, 1992), 459 pp.

With respect to elected judges, the bill appears to apply the ADEA only insofar as protecting an elected judge against age-based mandatory retirement prior to the completion of a full term of office. The limited nature of this objective would be made clearer were the bill to contain the word "solely" prior to "with respect to retirement."

In summary, the EEOC believes that the proposed legislation -- which would continue the exemption for State and local firefighters and law enforcement officers -- is inconsistent with Congress' purpose in 1986. Further legislation on this issue was to be based on the results of the study the Commission was charged by Congress to conduct. The findings contained in the Congressionally-mandated study on age and public safety jobs concluded that valid and job-related tests are viable alternatives to basing hiring and retirement decisions on age alone.

Thank you for providing the EEOC an opportunity to comment on this legislation. The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,



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Chairman

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CHUCK WICKLER
EXECUTIVE DIRECTOR

Police Executive Research Forum Position Statement

Public Safety Exemption to the Age Discrimination in Employment Act (ADEA)

March 29, 1994

Background

In 1986, Congress passed an amendment to the ADEA that eliminated mandatory retirement for all employees. Law enforcement officers and fire fighters were granted a seven-year exemption from the law, so that a study could be done to determine whether age should be a bona fide occupational qualification for public safety positions. The exemption expired on January 1, 1994.

The study, conducted for the Equal Employment Opportunity Commission by Pennsylvania State University, concluded that the chances of an asymptomatic officer experiencing a catastrophic medical event while carrying out his or her responsibilities is extremely small and not well-predicted by age. The study also found that age-associated declines in cognitive and physical abilities that could potentially affect an officer's capacity to carry out public safety tasks are highly modifiable, can be "attributed to injury, illness and lifestyle variables," and vary widely from one individual to another. The study further concluded that there are tests available for predicting the probability of both catastrophic medical events and age-associated declines "that

are more effective than age and have lesser adverse impact on older employees." Based on these and other conclusions, the study recommended that the public safety exemption be eliminated.

Position

Prior to the expiration of the public safety exemption, PERF surveyed all members to determine an organizational position on this issue. Seventy-three percent of responding PERF members supported performance-based retirement (opposed an extension of the police exemption); 19% supported mandatory retirement for police (supported an extension of the public safety exemption); and 8% indicated PERF should not take a position on this issue. PERF members also debated the merits of the public safety exemption at their 1993 annual meeting; many of the participants in the discussion seemed to favor performance-based retirement.

Based on the membership survey results, the annual meeting discussion and the Penn State study conclusions, the Police Executive Research Forum supports performance-based retirement policies for public safety employees; in addition, PERF opposes a reinstatement of the public safety exemption to the ADEA. It is our belief that public safety employment decisions should be made solely on the basis of a person's ability to perform the essential functions of a job, rather than non-performance based criteria such as age, disability, race, sex and other similar characteristics protected by federal, state and local law. For additional information, please contact Karin Schmerler of PERF at (202) 466-7820.



FACT SHEET

Promoting
16 Years
Progressive

The Police Executive Research Forum (PERF) is a national membership organization of progressive police executives from the largest city, county and state law enforcement agencies. PERF is dedicated to improving policing and advancing professionalism through research and involvement in public policy debate. PERF's primary source of operating revenues are government grants and contracts and partnerships with private foundations and other organizations.

BACKGROUND: Before the mid-70s, most police executives accepted the status quo in law enforcement and rarely discussed issues among themselves. But, as crime increased and new kinds of information became available through research, police executives began to question traditional police practices. In 1973, ten police executives from some of the nation's largest cities met informally to discuss common policing concerns. Driven by the successful exchanges that took place at their meeting, the chiefs decided to meet on a regular basis to explore tough issues and develop a professional body of knowledge aimed at reducing crime and improving the quality of policing.

PERF GOALS: Incorporated in 1977, PERF was founded to:

- Improve the delivery of police services and crime control nationwide.
- Encourage debate of police and criminal justice issues within the law enforcement community.
- Implement and promote the use of law enforcement research.
- Provide national leadership, technical assistance and vital management services to police agencies.

MEMBERSHIP: PERF membership requirements are unique among law enforcement organizations in that potential members must be nominated and approved by current PERF general members. To qualify for general membership, a police executive must hold a four-year degree from an accredited institution and head a department of at least 100 full-time employees or a jurisdiction of at least 50,000 persons. They must also be committed to the organization's principles and willing to take on tough issues. To obtain different viewpoints, which enable PERF to formulate innovative responses, PERF offers other categories of membership to academicians and law enforcement personnel from smaller jurisdictions.

STAFF: PERF staff includes former police executives, criminal justice experts and professionals with extensive experience in management, research, training and policy analysis. Daily contact with police chiefs and law enforcement agencies enables PERF staff to provide answers to issues that plague police executives, such as domestic abuse, firearm-related violence, drug trafficking and the plight of the homeless.

RESEARCH: Working with police practitioners to apply research to real-life situations and tailor experiments to meet the needs of their communities is the cornerstone of PERF. PERF researches the most compelling issues facing police — how to control crime and drugs, maintain law and order and operate an efficient organization. PERF also encourages research on controversial and sensitive issues, such as the police response to the homeless and police handling of persons with AIDS.

Current PERF projects address youth gangs, police compliance with the Americans with Disabilities Act, ways of preventing and combatting urban decay and crime, police awareness of cultural differences issues, school violence, factors that influence the growth and decline of drug markets and police use of excessive force. In the past, PERF has been involved in the development and implementation of a problem-oriented approach to drug enforcement, new approaches for coping with repeat offenders, national accreditation standards for law enforcement and the testing of criminal investigation models.

INFORMATION CLEARINGHOUSE AND RESOURCES CENTER: The escalating demands for police assistance in the 1980s and 1990s by communities and political leaders require law enforcement executives to search continually for information that can help them formulate effective police programs. To communicate the latest in police-related innovation, research, legislation and other relevant issues, PERF publishes three newsletters and writes and disseminates books and reports that are widely used by police departments, colleges, the media and governments throughout the world. Frequently, PERF members are asked to serve on national commissions and testify before the U.S. Congress on important national issues. PERF staff and members are interviewed regularly by the press on matters affecting communities across the nation. They also release position papers on high-priority public safety legislation.

In 1987, PERF established METAPOL, the nationwide electronic telecommunications network through which police executives and others concerned with law enforcement issues can communicate and receive immediate feedback. Through its Management Services Program, PERF offers technical assistance, training and a wide array of services to member and non-member police organizations of all sizes. PERF also provides assistance in policy-making to law enforcement agencies through its Policy Center, which contains policy and procedures manuals collected from law enforcement agencies throughout the United States and Canada.

SENIOR MANAGEMENT INSTITUTE FOR POLICE (SMIP): SMIP is an intensive three-week course which merges real-life police experience with management techniques drawn from business school curricula. Using the case-study method, professors from leading academic institutions teach current and future police executives how to apply business principles and concepts to policing strategies.

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April 19, 1994

Hon. Edward M. Kennedy
Chairman
Senate Committee on Labor
and Human Resources
115 Russell Senate Office Building
Washington, D.C. 20510


Dear Senator Kennedy:

We understand that H.R. 3722 is scheduled for hearings before your committee on April 19, 1994. On behalf of our 17,000 law enforcement members throughout Massachusetts, we respectfully urge you to do whatever it takes to defeat this bill and protect the ability of our members to continue working.

This bill would permanently exempt Massachusetts and other states from complying with the Age Discrimination in Employment Act, at least with respect to some police officers and fire service personnel, and could result in a substantial number of our members being forced to retire before their time.

The defeat of H.R. 3722 would leave in place current retirement laws, but would permit a police officer, or a group of police officers to challenge a mandatory retirement age. We believe firmly that the ability of any public employee to challenge a mandatory retirement must be protected as a basic tenet of democracy and a fundamental right to guard against age discrimination.

We offer whatever help you deem necessary in this matter, and we thank you for your help.


EDWARD M. MERRICK
Executive Board
Legislative Director



Massachusetts State Police Commissioned Officers Association

April 18, 1994

Senator Edward M. Kennedy
Senate Labor and Human Resources Committee
Washington, D.C. 20510

Dear Senator Kennedy,

As president of the Massachusetts State Police Commissioned Officers Association, I am writing to you to express our opposition to HR 2722.

We strongly feel that state police officers over the age of fifty-five can perform all of the duties incumbent upon them, as long as they are physically able and willing, therefore we are in support of our association members who meet that criteria and support them in their efforts.

Sincerely,

Joseph C. Saccardo
Joseph C. Saccardo
President

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United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES

WASHINGTON, DC 20510-8300

April 25, 1994

The Honorable Howard M. Metzenbaum
Chairman, Senate Subcommittee on Labor
Senate Committee on Labor and Human Resources
Hart Senate Office Building Room 608

Dear Howard:

Charles M. Loveless, Director of Legislation for the American Federation of State, County, and Municipal Employees, has sent the enclosed letter expressing AFSCME's support of H.R. 2722, the Age Discrimination and Employment Act, and asking that his letter be included in the hearing record.

Many thanks for your help.

Sincerely,

Joe



American Federation of State, County and Municipal Employees, AFL-CIO

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The Honorable Edward M. Kennedy
Labor and Human Resources Subcommittee on Labor
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

On behalf of the 1.3 million members of the American Federation of State, County and Municipal Employees (AFSCME), I urge you to support H.R. 2722, the Age Discrimination in Employment Act (ADEA). We also request that this letter be made a part of the official Committee record as written testimony in favor of this legislation.

This legislation makes permanent a temporary waiver from the ADEA which allows public safety agencies to utilize mandatory retirement and/or maximum entry ages. H.R. 2722 would enable state and local governments to continue using age-based hiring and retirement policies for law enforcement officers and firefighters as a way to ensure an effective and balanced public safety workforce.

While we support the intent of the ADEA, we believe that special consideration must be given to protecting the public safety. This legislation will continue the exemption, which gives state and local governments the discretion to establish proper retirement ages for public safety officers.

I urge your support of H.R. 2722 when it is reported out of the subcommittee.

Sincerely,

Charles M. Loveless
Director of Legislation

CML:cyb

in the public service

Senator METZENBAUM. The subcommittee stands adjourned.
[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]

